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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

APRIL 30, 1918—JUNE 24 1918

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REPORTER

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JUDGES

OF THE

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ERRATA

Page 151, 2nd syllabus, line 1, for Included read Concluded

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 14380. Department Two. April 30, 1918.]

S. T. HILLS, *as Trustee in Bankruptcy of The Natatorium Company, Respondent,* v. C. D. STIMSON COMPANY, *Appellant.*[1]

FIXTURES—LEASE—CONSTRUCTION. Under a lease of a natatorium building requiring the lessee to install equipment, and providing that such personal property and equipment shall immediately become the property of the lessor as additional consideration for the lease, all the furniture and fixtures become the property of the lessor.

BANKRUPTCY—PREFERENCE—SURRENDER OF LEASED PREMISES. Surrender of leased premises by a bankrupt is not a preference, where the property was in fact and in law the property of the lessor, subject to payment of rent, and had reverted through forfeiture.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 2, 1917, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Reversed.

Hughes, McMicken, Ramsey & Rupp, for appellant.

Cassius E. Gates, Jones & Riddell, and *R. C. Hazen,* for respondent.

MOUNT, J.—This is an action in replevin, brought to recover possession of certain personal property al-

[1]Reported in 172 Pac. 1181.

leged to be of the value of $18,000. Issue was made as to the ownership of the property. Upon this issue the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the return of certain of the property or its value, conceded to be $15,641. The defendant has appealed from that judgment.

The facts are briefly as follows: The respondent, S. T. Hills, is trustee in bankruptcy of the Natatorium Company, a corporation. On November 11, 1915, the Natatorium Company entered into an agreement with the appellant, by which agreement the appellant engaged to erect a building upon three certain lots in the city of Seattle for a natatorium building to be used by the Natatorium Company. It was agreed that the cost of this building should not exceed $115,000; that, as part consideration for the lease which was provided for in the agreement, the Natatorium Company was to pay $50,000 in cash to the appellant, and was also to install in the building, at the terminal of the pipe line necessary to connect the building with the salt water of Elliott Bay, salt-water pumps, dynamos, motors, laundry machinery and appliances, opera chairs, furniture, fixtures, filters and other necessary machinery and equipment, all of which, when installed in the building, should become a part of the property of the appellant. It was provided in the agreement that these appliances should not cost less than $20,000, except that it was provided that certain machinery, chairs, etc., might be purchased upon conditional sale, if not encumbered in excess of $4,328. It was also provided that, if the building and pipe line should cost in excess of $115,000, the Natatorium Company should pay such excess, and that all improvements placed upon the premises by the Natatorium Company should be deemed a part of the building and belong to the ap-

pellant, except as to any additional equipment or property in excess of said $20,000 worth of equipment, or replacement or substitutions thereof. The contract of lease also provided that, upon the completion of the building, when it should be occupied by the Natatorium Company, that company should pay a monthly rental of $900, payable in advance. It also provided that, in case the rent was not paid, the appellant might terminate the lease and take possession of the premises, subject to redemption within three months at an increased rental for that time. On March 6, 1916, a supplementary agreement between the parties was made which provided for installing a heating and lighting plant necessary for the natatorium building, at a cost of $10,000; and that the Natatorium Company should pay an additional rent on account of the heating and lighting plant in the sum of $100 per month. The building was entirely completed and the necessary equipment was placed therein prior to the 28th day of June, 1916. On that date the appellant turned over the possession of the building with the equipment, under the terms of the lease, to the Natatorium Company.

After the building was completed and had been taken possession of by the Natatorium Company, it was ascertained that the cost of the building had exceeded the stipulated price of $115,000. Materialmen were threatening to file liens against the property. The appellant then insisted that the Natatorium Company should pay the excess cost to the lien claimants in accordance with the terms of the original contract, and because of failure to do so, the appellant asserted its right to a forfeiture of the lease. The business of the Natatorium Company, from the time of its opening in June, 1916, had prospered for a short time, and afterwards it failed to meet its obligations. On the 25th day of August, 1916, another agreement was made be-

tween the appellant and the Natatorium Company, by which agreement it was recited that the Natatorium Company had failed to pay the cost of the building in excess of $115,000, and that the appellant was entitled to the surrender of the premises and the termination of the lease. It was thereupon stipulated that the Natatorium Company should surrender to the appellant the possession of the leased premises, together with the appurtenances and equipment used in the conduct of the business; and it was provided that the Natatorium Company should have six months, instead of three months stipulated in the original lease, in which to redeem the leasehold estate upon paying the appellant any sums it might pay off to clear the property of liens, with interest at 7 per cent, and further, paying the accrued rentals therein provided in case of redemption after forfeiture. This arrangement continued until the 17th day of November, 1916, when the Natatorium Company abandoned and surrendered the premises, together with all the equipment, to the appellant. Thereafter, within four months after August 25, 1916, the Natatorium Company was adjudged a bankrupt in the United States court, and Mr. Hills was appointed trustee in bankruptcy, and brought this action to recover certain of the equipment placed in the building prior to the delivery of the premises to the Natatorium Company, and certain goods held in store after that time.

There is substantially no dispute upon the facts in the case. The question of the ownership of the property depends largely, if not entirely, upon the construction of the contracts entered into between the Natatorium Company and the appellant. After carefully reading these contracts and the statement of facts in the case, we are convinced that all the property sued for, except that which was stipulated at the trial to belong

to the Natatorium Company, is clearly the property of the appellant. The original contract entered into between the parties on the 11th day of November, 1915, plainly and definitely recites that, in consideration for the lease, which was to run for a period of twenty-five years, the Natatorium Company was to pay to the appellant the sum of $50,000; that, in addition thereto, the Natatorium Company was to pay the cost of the building in excess of $115,000; and that it was required to install in the building machinery, appliances, chairs, furniture, fixtures, filters and other machinery and equipment, at a cost of not less than $20,000;

"and it is agreed that said personal property and equipment, together with all replacements and substitutions thereof, shall immediately become the property of the party of the first part, as additional consideration for this lease."

So it is apparent from the terms of the contract of lease itself that all the furniture, fixtures, etc., placed in the building immediately became the property of the appellant. The subsequent additional agreement with reference to a heating and lighting plant did not change the terms of the original lease, except to increase the rent $100 per month by reason of the additional cost of the heating and lighting plant paid for by the appellant. The agreement of August 25, 1916, made no change in the original agreement so far as the ownership of the property designated as appliances, etc., was concerned. That agreement simply modified the original lease agreement so that, upon failure of the Natatorium Company to pay the rent or to pay the obligations of the Natatorium Company, the appellant might take immediate possession of the premises and conduct the business as a natatorium for a period of six months, and if in the meantime the Natatorium Company paid up its obligations and rent at

an increased rental figure, then the property might be again taken possession of by the Natatorium Company. The possession of the property was surrendered to the appellant on August 25, 1916, and became, under the terms of the lease, the absolute property of the appellant because it was not redeemed within the time limited.

A careful examination of all the evidence in the case and a reading of the contracts, which were received in evidence, convinces us that the consideration for the original lease was $50,000 in cash, which is conceded to have been paid, the payment of the excess cost of the building over $115,000, and the purchase of $20,000 worth of furniture, etc.; and that these considerations were considerations for the original lease contract, and the furniture, etc., when placed in the building, became the property of the appellant company. The fact that the Natatorium Company went into bankruptcy within four months after August 25, 1916, did not change the character of the property. The machinery, appliances, etc., when put into the building, became immediately the property of the appellant. The surrender of the leased premises, together with the property placed therein by the Natatorium Company, did not change the character of the ownership.

It is argued by the respondent that the surrender of the leased premises to the appellant was in substance a preference of the appellant as creditor, but we think this argument is without force, because the property surrendered by the Natatorium Company was, in fact and in law, at that time the property of the appellant. The only right which the Natatorium Company had to this property was a leasehold right to use the property, subject to the payment of its rent. When the leasehold was forfeited the possession simply reverted to the lessor, which cannot be said to be in any way a

preference. Nor was it necessary that the lease should be recorded so far as creditors were concerned. The title to the property was of record and stood in the name of the appellant, and persons doing business with the Natatorium Company must, of course, take notice of that fact. Neither was the agreement of August 25, 1916, a chattel mortgage, and it was not necessary to be recorded as such. As we have above intimated, the real property, together with the building and the equipment placed therein under the original lease, was at all times the property of the appellant. The equipment never became the property of the Natatorium Company after it was placed in the building subject to the lease. Like the $50,000 cash, which no doubt also went into the building, it became a part of the building by the terms of the lease. We are clearly of the opinion that the trial court erred in concluding that the property sought here, except that which was conceded upon the trial to be the property of the Natatorium Company, was the property of that company to which the trustee in bankruptcy was entitled.

The judgment of the trial court is therefore reversed, and the cause remanded with direction to the lower court to enter a judgment for the appellant in accordance with this opinion, the appellant to recover costs.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14411. Department Two. April 30, 1918.]

NICK DARAVELEAS, *Respondent*, v. NORTON H. MORRISON *et al.*, *Appellants*.[1]

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE—DUTY TO WARN. In an action for personal injuries inflicted by starting up the engine of a steam thresher without warning while plaintiff was in a place of danger cleaning out the separator, the fellow servant doctrine is not in issue, since it was a nondelegable duty of the master to give a warning of the starting of the machinery under such circumstances.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 7, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee working on a separator. Affirmed.

Graves, Kizer & Graves, for appellants.

Nuzum, Clark & Nuzum and *Geo. H. Armitage*, for respondent.

HOLCOMB, J.—In this action to recover damages for personal injuries, alleged to have been caused while plaintiff was working on a separator threshing turnip seed on defendants' farm, plaintiff had verdict and judgment.

Appellants answered by admissions and general denial and the affirmative defense of contributory negligence. They did not plead as an affirmative defense that respondent's injury was caused by the negligence of a fellow servant. They did not move for a nonsuit or a directed verdict. They did not request instructions respecting negligence of fellow servants, or any other.

The straw was run through two separators. It passed from the first, or big machine, through a con-

[1]Reported in 172 Pac. 814.

veyor to the cylinder of the second, or little machine. Each separator was run by an independent engine. The cylinder of the small separator occasionally became clogged, and it was respondent's duty to clear it and, in pursuance thereof, to signal for the engineer to stop. The engine was about seventy feet from the cylinder of the separator, and the engineer could see plainly any one on top of the separator or working about the cylinder. Signals to stop or start were given by the hand or voice by the man on top of the separator to the engineer. It was customary for the engineer to give two short toots of the whistle before he started his engine. Prior to the time of the accident, the separator had stopped, having become clogged, and while respondent was engaged in clearing the cylinder, the engine suddenly started without any warning or signal, causing the injury to respondent.

Appellants assign as errors: (1) Giving instruction No. 3; (2) denying defendants' motion for judgment *non obstante;* (3) denying defendants' alternative motion for new trial.

Appellants excepted generally to instruction No. 3, which is:

"If the plaintiff has shown by the preponderance of the evidence that pursuant to his signal the machine was stopped, and that he then stepped down upon the revolving belt which carried the straw into the cylinder, and was engaged in cleaning out the cylinder, and that while so engaged and without notice or warning to him, the machine was started, carrying him into the cylinder, thus injuring him, then the plaintiff will be entitled to damages on account of his injuries from the defendants."

We will concede that the above instruction would be erroneous if the fellow servant doctrine had been an issue and no other instruction had been given. We are not disposed to sustain the fellow servant theory. The

injury was due to lack of warning in starting machinery while respondent was in a place of extreme danger. To give such warning is a nondelegable duty of the master, from which he cannot escape liability by delegating the duty to another. *Schneider v. South Tacoma Mill Co.*, 65 Wash. 590, 118 Pac. 750. Threshing machines and their appliances may not be as dangerous instrumentalities as sawmills and their appliances, but any high-powered mechanical apparatus, usually operated at great speed and requiring human labor to attend, necessarily has great potentialities of danger and injury. The mere fact that the accident happened on a farm, from machinery operated for farming purposes, furnishes no exception to the general rule above stated.

The jury found in favor of respondent, and if there is sufficient evidence in the record upon which a judgment can be based, we will not set the verdict aside. Having concluded against appellants' fellow servant theory and finding no error, it becomes unnecessary to extend this opinion by further discussing the motions for judgment *non obstante* and for new trial.

The judgment of the trial court is affirmed.

ELLIS, C. J., PARKER, and CHADWICK, JJ., concur.

[No. 14461. Department One. April 30, 1918.]

JAMES CARKONEN, *as Administrator etc., Appellant,* v. COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Respondent.*[1]

JUDGES—POWERS—SUCCESSOR IN OFFICE — GRANT OF NEW TRIAL. Upon the death of the judge who tried the case, his successor in office has the same power and discretion to grant a new trial as the predecessor had, in view of Rem. Code, § 67, providing that no proceeding is affected by a vacancy in the office of the judge, and the fact that courts are continuing governmental entities.

NEW TRIAL—DISCRETION—ON DEATH OF JUDGE. An order by a succeeding judge granting a new trial because against the weight of the evidence, is not shown to have been without the exercise of his discretion because his opinion shows that he sought to ascertain the opinion of his predecessor in office, where it further shows that he gave the fullest consideration to the evidence and determined the matter upon the entire record and exercised his own discretion.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The granting of a new trial for insufficiency of the evidence cannot be said to be an abuse of discretion where there was a substantial conflict in the evidence.

Appeal from an order of the superior court for King county, Jurey, J., entered January 23, 1917, setting aside a judgment and granting a new trial, in an action for wrongful death. Affirmed.

George H. Rummens and *Edward Brady,* for appellant.

Farrell, Kane & Stratton, and *Stanley J. Padden,* for respondent.

FULLERTON, J.—One John Athanasiades, while engaged in labor as a section hand on respondent's line of railway, was run over and killed by one of its regular passenger trains. The appellant, as administrator of the estate of the decedent, brought an action un-

[1]Reported in 172 Pac. 816.

der the Federal employers' liability act to recover for the benefit of the widow and minor children. Verdicts were returned for $2,850 in favor of the widow, $900 in favor of the elder daughter, and $1,950 in favor of the younger daughter, aggregating a total of $5,700. Judgment was entered upon the verdict, and two days thereafter the respondent moved for judgment notwithstanding the verdict, and also for a new trial. On a hearing before the trial judge, the motion for judgment *non obstante* was granted, but no disposition was made of the motion for new trial. On an appeal from the judgment rendered notwithstanding the verdict, we held that the motion therefor was not timely made, inasmuch as judgment on the verdict had been entered prior to the filing of the motion. The judgment was reversed, and the cause remanded with instructions to the lower court to consider and determine the motion for a new trial which was pending and undisposed of. See *Carkonen v. Columbia & Puget Sound R. Co.*, 86 Wash. 473, 150 Pac. 1162. The superior judge who had tried the cause had died pending the appeal, and when the cause was remanded for determination of the motion for a new trial, the matter was considered and determined by his successor in office, who made an order setting aside the judgment on the verdict and granting a new trial. This order is assigned by the appellant as error.

The first contention urged by the appellant is that the successor of a judge who tried a cause is not vested with the same discretion as his predecessor in granting a new trial on the ground of insufficiency of the evidence, for the reason that the successor has not heard the witnesses testify nor observed their demeanor, thus precluding his ability to pass upon the question whether the losing party has had a fair trial. Appellant argues that, because of such fact, the rule that the

order granting a new trial will not be disturbed on appeal except upon a showing of abuse of discretion does not apply. In other words, the appellant contends that the successor in the judicial office lacks jurisdiction to exercise such a discretion. Our statute (Rem. Code, § 398) defines a new trial as a reexamination of an issue in the same court. Further provision is made by Rem. Code, § 67, that, "No proceeding in a court of justice, in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a session of the court." It is apparent that judicial powers are vested in the court, rather than in the individual exercising functions as a judge. In the case of *Shephard v. Gove,* 26 Wash. 452, 67 Pac. 256, where a successor in the office of judge disregarded a ruling in the same case by his predecessor, we said:

"It is insisted by the appellant that Judge Griffin had no right to overrule a decision made by Judge Jacobs in the case. But the succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court."

In the case of *State ex rel. Rucker v. Superior Court,* 18 Wash. 227, 51 Pac. 365, where the successor in the office of judge vacated a prior judgment, we said:

"The judge of the superior court, who directed the judgment of dismissal on the 29th day of December, 1896, retired from office and his successor occupied the office at the time the motion to vacate the judgment was made. The action of the superior court is that of the judge of the court, and a change in the persons who occupied the position does not affect the consideration of the vacation of the judgment."

That the successor in office of the judge who presided at the trial of a cause is vested with discretion to pass upon a motion for a new trial is well settled in other jurisdictions. See: *Hughley v. Wabasha,* 69 Minn. 245, 72 N. W. 78; *Benson v. Hall,* 197 Mass. 517, 83 N. E. 1036; *Jones v. Sanders,* 103 Cal. 678, 37 Pac. 649; *Southall v. Evans,* 114 Va. 461, 76 S. E. 929, Ann. Cas. 1914B 1229, 43 L. R. A. (N. S.) 468; *Pennsylvania Mut. Life Ins. Co. v. Ashe,* 145 Fed. 593, 7 Ann. Cas. 491, note.

Through all the decisions runs the idea that courts are continuing governmental entities and that the individual judges are designed to guide the operation of the machinery. In the functioning of courts, the law is concerned only with the personal element of the presiding judge when there is abuse of discretion or misconduct on his part. His errors of law are errors of the court. We have no doubt, therefore, that a successor in the judicial office has power to exercise his discretion in passing upon a motion for a new trial when the judge who tried the cause has met with death or his term of office has expired.

The appellant sets forth the memorandum opinion of the trial judge and contends therefrom that the judge passing upon the motion did not exercise his own judgment and discretion in so doing, but rather sought to ascertain the opinion of his predecessor in office and give effect to what he believed was the opinion of such predecessor. But while the judge did make some comment to the effect that he had endeavored to ascertain his predecessor's views, we find the following in his opinion:

"The motion for new trial has been thoroughly argued and briefed before me, and upon the earnest insistence of counsel for plaintiff I have read in full the statement of facts used on the appeal. Upon the

argument, briefs and statement of facts, I was satisfied that the motion for new trial should be granted unless such was precluded by the question of last clear chance raised by counsel for plaintiff. After consideration of brief of counsel for plaintiff upon the question of last clear chance, I read over again the testimony of the engineer, upon whose testimony this question is raised. I do not understand that this question was raised on the trial. The engineer was not examined in chief, or cross-examined, or examined or questioned at all, upon any such proposition. He was not given any opportunity to explain some of his statements which might be taken as tending to establish the contentions of counsel for plaintiff. However, in my judgment the testimony as it stands is wholly insufficient to sustain the contentions of counsel for plaintiff in this regard. For the reasons stated, the motion for new trial will be granted. A formal order to that effect, if desired, may be prepared and presented upon due service and notice to counsel on the other side."

This, we think, shows that the judge, while taking into consideration what he conceived to be the views of his predecessor in office, determined the matter from the entire record and exercised his own judgment and discretion in so doing. This court has frequently held that it is within the province of the trial court to grant a new trial where it is convinced that the verdict of the jury is against the weight of the evidence, and that it will not hold such an order to be an abuse of discretion when it finds a substantial conflict in the evidence. It may be there was error in the original holding of a want of sufficient evidence on the part of the plaintiff to make a case for the jury, but there is no doubt as to there being a substantial conflict.

The order is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14466. Department One. April 30, 1918.]

ALICE EMPSON, *Plaintiff*, v. JOHN FORTUNE *et al.*, *Defendants and Appellants*, MAX KREIELSHEIMER *et al.*, *Respondents*.[1]

APPEAL—SUPERSEDEAS BOND—LIABILITY OF SURETIES. Under Rem. Code, § 1722, requiring a supersedeas bond on appeal to be conditioned to satisfy and perform the judgment appealed from and any judgment or order which the supreme court may render or make or order to be rendered or made, the sureties on the appellant's supersedeas bond are liable for a money judgment entered against appellant on the order of the supreme court, although the judgment was in form a reversal of a money judgment along with other relief, but which ultimately directed an entry of a like money judgment against the appellant.

SAME—SUPERSEDEAS BOND—LIABILITY OF SURETY—ENTRY OF JUDGMENT ON APPEAL. Failure of the supreme court to enter or direct entry of judgment against appellant's sureties upon a supersedeas bond, does not release the sureties and is not *res judicata* of their liability on the bond, where the judgment of the supreme court against the appellant was not merely an affirmance of a money judgment; in view of the fact that by Rem. Code, § 1739, the only authority for the supreme court to enter judgment against sureties on a supersedeas bond is where the judgment on appeal for the payment of money is affirmed.

SAME—SUPERSEDEAS BOND—ENTRY OF JUDGMENT—POWERS OF SUPERIOR COURT. The superior court, not being authorized by any statute, has no power after appeal and remittitur to enter judgment against the sureties on appellant's supersedeas bond, in connection with the judgment it is by the supreme court ordered to enter.

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—SUFFICIENCY. A claim against the executors of a deceased surety upon a supersedeas bond is insufficient where it consisted merely of the presentation of an abstract of the judgment, and was not verified by oath, as required by Rem. Code, § 1473.

SAME—CLAIMS—PRESENTATION—WAIVER. The due presentation of a claim against the estate of a deceased person cannot be waived by the executor or administrator.

PRINCIPAL AND SURETY—RELEASE OF CO-SURETY—FAILURE TO FILE CLAIM AGAINST ESTATE. The failure to present a claim against the

[1]Reported in 172 Pac. 873.

executor of the estate of a deceased surety upon a supersedeas bond does not release the other surety from liability on the bond, where suit was brought against the surviving surety within the year limited to creditors for filing claims against the estate of the deceased surety, and in time to enable the surviving surety to protect his right to contribution from the estate by filing his claim therefor.

APPEAL—SUPERSEDEAS BOND—LIABILITY OF SURETY—JOINT OR SEVERAL OBLIGATION. A supersedeas bond, not in form either joint or several, in which the sureties are simply held and firmly bound, etc., will, in view of the language used and purpose of the statute, be construed as intended to be a joint and several bond, upon which one of the sureties may be sued separately.

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered February 7, 1917, upon findings favorable to the plaintiff, in an action on a supersedeas bond, tried to the court. Affirmed.

C. H. Steffen and *Andrew J. Balliet,* for appellant Empson.

John F. Murphy, for appellant Fortune.

Jay C. Allen, for respondents.

PARKER, J.—Alice Empson seeks recovery upon a supersedeas bond executed by John Fortune and Jacob Kreielsheimer, as sureties, and Hayes & Porter, Incorporated, as principal. Trial in the superior court for King county resulted in findings and judgment in favor of Alice Empson, awarding her recovery against John Fortune, but denying her recovery against the executors of the estate of Jacob Kreielsheimer, deceased. John Fortune has appealed from the judgment rendered against him, and Alice Empson has appealed from the judgment in so far as it denies her recovery against the estate of Jacob Kreielsheimer, deceased.

The controlling facts may be summarized as follows: On March 20, 1914, in an action pending in the superior court for King county, wherein Hayes & Porter,

Incorporated, was plaintiff and Alice Empson and Amos Wood were defendants, there was rendered upon the defendants' cross-complaint a money judgment in their favor against Hayes & Porter, Incorporated, for the sum of $1,500. Hayes & Porter appealed therefrom to this court, and stayed execution thereon by causing to be executed and filed in the cause in the superior court a supersedeas bond in due form as prescribed by Rem. Code, § 1722, which bond was executed by John Fortune and Jacob Kreielsheimer as sureties. On March 26, 1915, Jacob Kreielsheimer died, and thereafter, on April 16, 1915, Max and Simon Kreielsheimer were duly appointed and became the acting executors of his estate. On July 14, 1915, the case was disposed of by this court as follows:

"The judgment will be reversed, therefore, and the cause remanded with instructions to enter a judgment in favor of the respondents: (1) Cancelling the contract of sale of the hotel property; (2) directing that the notes given to evidence the deferred payments be delivered up and cancelled; (3) for a recovery against the appellant in the sum of $1,500; and (4) a judgment in favor of the appellant against the respondents confirming its possession of the hotel property. Neither party will recover costs in this court." *Hayes & Porter v. Wood,* 86 Wash. 254, 150 Pac. 1.

This disposition of the cause, while in form a reversal of the $1,500 judgment rendered by the superior court, was a direction to that court to enter the same judgment and, in addition thereto, to grant other relief which had been prayed for by Wood and Empson in their cross-complaint. The only error of the trial court consisted in its failure to grant this additional relief, as is rendered plain by a reading of this court's decision. This court did not render any judgment against the sureties upon the supersedeas bond, nor direct the superior court to render any such judgment.

On November 22, 1915, the remittitur from this court having been transmitted to the superior court, that court entered its judgment and decree as directed by this court. Thereafter Amos Wood duly assigned in writing to Alice Empson all his interest in the judgment rendered by the superior court by direction of the supreme court, she thereby becoming the sole owner of the judgment. Thereafter, Alice Empson being unable to collect her $1,500 judgment, or any part thereof, from Hayes & Porter, commenced this action on March 10, 1916, against John Fortune and the executors of Jacob Kreielsheimer, as sureties upon the supersedeas bond. Thereafter judgment in this action was rendered on February 7, 1917, as above noticed. Other facts will be noticed as may become necessary in connection with our discussion of the several contentions made by counsel.

It is contended in behalf of appellant Fortune that, because the decision of this court in the case of Hayes & Porter against Wood and Empson in form reversed the judgment of the superior court and directed another judgment to be entered in that cause by that court, the sureties upon the supersedeas bond are not liable thereon. The argument is, in substance, that no judgment can be rendered against sureties upon a supersedeas bond unless the judgment appealed from is affirmed by the supreme court. We shall assume, for argument's sake, that the disposition of the cause in this court was a reversal of the first $1,500 judgment rendered by the superior court, though there seems to be fair ground for arguing that it was a reversal, not in substance, but in form only, in view of the fact that this court in the same decision directed exactly the same judgment to be entered in favor of and against the same parties, with the granting of other relief. A number of the decisions of the courts of other states

are called to our attention which hold in substance as stated in the text of 2 R. C. L. 270, as follows:

"When an order is entered in an appellate court reversing a judgment, it is forthwith vacated and no longer remains in existence."

This is a thought which counsel seeks to emphasize. But we think it is not controlling here in the light of our statute. Section 1722, Rem. Code, in so far as it relates to supersedeas bonds, reads as follows:

"An appeal shall not stay proceedings on the judgment or order appealed from or any part thereof, unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court."

This language, it seems to us, renders it plain that a supersedeas bond secures something more than the mere payment of an affirmed judgment. If not, then we are wholly unable to assign any intelligible meaning to the concluding words of this quoted provision. This language seems peculiarly applicable to this case. Nothing could seem farther from the thought of this court, when it in form reversed the money judgment in favor of Wood and Empson, than an intent on its part to deny them recovery in that sum against Hayes & Porter, for in its same decision it directed a judgment in that amount to be entered by the superior court in favor of Wood and Empson against Hayes & Porter, together with judgment for other relief, as to which the superior court had erred in failing to grant, as held by this court. We conclude, therefore, that the sureties, to wit, Fortune and the estate of Jacob Kreielsheimer, were liable upon the supersedeas bond for the

payment of the judgment so directed to be entered by this court.

It is also contended in appellant Fortune's behalf that he was released as surety upon the supersedeas bond because this court did not render any judgment against him as surety when it remanded the cause to the superior court and did not direct that court to render any judgment against him as surety, and also because the superior court did not render any judgment against him as surety when it entered the judgment against Hayes & Porter which was directed by this court to be rendered. The theory of counsel seems to be that the failure of action of the courts in this respect became in effect *res adjudicata* in his favor upon the question of his liability upon the bond.

In so far as the failure of this court to render any judgment against the sureties is concerned, it seems plain from the language of § 1739, Rem. Code, relating to the rendering of judgments against sureties upon a supersedeas bond by this court upon the final disposition of an appeal, that this court has no power to render such judgment except when it affirms a judgment of the superior court for the payment of which a supersedeas bond is given. That section reads:

"Upon the affirmance of a judgment or (on) appeal for the payment of money, the supreme court shall render judgment against both the appellant and his sureties in the appeal bond for the amount of the judgment appealed from (in case the bond was conditioned so as to support such judgment) and for the damages and costs awarded on the appeal; and in any other case of affirmance the supreme court shall likewise render judgment against both the appellant and his sureties in the appeal bond for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial."

No other statute authorizes this court to render a judgment against the sureties on such a bond nor does any statute authorize this court to direct the superior court to render judgment against the sureties upon such a bond when rendering a judgment in pursuance of direction of this court. Plainly, we think, the failure of this court to render judgment against the sureties, or to direct such judgment to be rendered by the superior court, was not *res adjudicata* of Wood and Empson's rights as against the sureties Fortune and Kreielsheimer.

In so far as the failure of the superior court to render such a judgment against the sureties Fortune and Kreielsheimer is concerned, it seems equally plain that a superior court has no power to render such a judgment in connection with a judgment it is by this court directed to render, because there is no statute authorizing a superior court to render such a judgment. Besides, as said in *Richardson v. Sears*, 87 Wash. 207, 151 Pac. 504: "We have held in a long line of cases that the trial court, after an appeal and remittitur, has no power to enter any other judgment or decree in the cause than that directed by the appellate court," and, as we have seen, this court did not direct the superior court to render any judgment against the sureties upon the bond.

It seems to be well settled law that whatever statutory right a successful party upon an appeal may have to a summary judgment rendered by the appellate court against sureties upon a supersedeas bond in connection with the final disposition of the case by the appellate court is a remedy merely cumulative of the common law remedy, and does not affect the right of such successful parties to maintain an independent action upon such a bond in lieu of such statutory remedy. 2 R. C. L. 319. We conclude that the failure of this

court and the superior court to render judgment against Fortune and Kreielsheimer, as sureties upon the supersedeas bond, when the case of Hayes & Porter against Wood and Empson was finally disposed of, did not in the least impair the right of Wood and Empson to seek recovery in an independent action upon the supersedeas bond.

It is contended in behalf of appellant Alice Empson that the superior court erred in denying her judgment against the executors of the estate of Jacob Kreielsheimer, who had executed the supersedeas bond as surety with Fortune. The superior court denied recovery so claimed, because there had not been presented to the executors any claim preliminary to this action as required by Rem. Code, §§ 1472-1479. The only thing done by Wood or Empson looking to the presentation of such a claim was the presentation to the executors of an abstract of the judgment for $1,500 rendered by the superior court against Hayes & Porter by direction of this court, which abstract was certified to by the clerk of the superior court. This abstract fails entirely to show or to suggest any liability on the part of Fortune and Kreielsheimer as sureties upon the supersedeas bond. Indeed, there is nothing upon its face indicating that it is a claim against the sureties or the executors of the estate of Jacob Kreielsheimer. Besides, it is not supported by the oath of any one as required by Rem. Code, § 1473. It is argued by counsel for Empson, first, that it is not such an obligation as is required to be supported by oath upon presentation to an executor or administrator; and, second, that these executors waived formal presentation thereof by writing Wood and Empson a note rejecting a claim but not designating this one. These contentions are both effectually answered by our holding in *Barto v. Stewart,* 21 Wash. 605, 59 Pac. 480, *Ward v.*

Magaha, 71 Wash. 679, 129 Pac. 395, *Seattle Nat. Bank v. Dickinson,* 72 Wash. 403, 130 Pac. 372, *Butterworth v. Bredemeyer,* 89 Wash. 677, 155 Pac. 152, and *Zuhn v. Horst,* 100 Wash. 359, 170 Pac. 1033. By these decisions it has become the settled law of this state that the proper presentation of a claim is a fact to be proven essential to the cause of action, and that an executor or administrator cannot, because of the mandatory provisions of our claim statute, waive such presentation so as to estop himself from defending upon the ground of want of such proper presentation. This alleged claim, in its last analysis, was not presented in writing at all, but a paper was presented which it is claimed, supplemented by oral evidence, constituted a claim, but which upon its face was not a claim against the estate of Kreielsheimer. Presentation of the claim was denied, and one of the questions of fact tried in the case. Plainly, we think, the trial court did not err in denying recovery against the executors for want of proper presentation of the claim sued upon.

It is further contended in behalf of appellant Fortune that he was in law released from liability upon the supersedeas bond because of Empson's failure to present a proper claim to the executors of the estate of Jacob Kreielsheimer, which resulted in her failure to recover against them. Counsel rely upon the general rule that the release by the beneficiary of one of two jointly bound cosureties will effect the release of the other, at least to the extent that the right of contribution of the other surety against the one so released is impaired thereby. We may concede, for argument's sake, this to be the law applicable when the release of one surety is effected by contract made with him by the beneficiary. However, no authority has been brought to our attention holding, where one of two sureties is released, as were these executors, that such release im-

pairs the beneficiary's rights to recover the full amount of the bond from the other, providing the bond upon which he sues is a several as well as a joint obligation, permitting his suing upon the bond and recovery in an action against one alone. It seems to us that Empson is in no less favorable position here than as if she had sued Fortune alone. If she could have done that, she could not now be held without right of recovery against him for the full amount by reason of her present situation relative to the executors. Plainly she did not release the executors by any contract or understanding had with them; besides, she commenced this action on March 10, 1916, plainly within the year for the presentation of claims to the executors, since they were appointed as such April 16, 1915. As to when thereafter they gave notice to creditors we are not advised, so that, in so far as the impairing of Fortune's right of contribution is concerned, he had ample time to present his contingent claim of contribution to the executors which might result from the recovery of the judgment against him for the whole amount of the bond. It would seem, therefore, that, if Empson was at all bound to take notice of the contribution rights which might arise as between the sureties, she, in any event, did not prevent Fortune from protecting his contribution right as against the executors. We do not express any opinion in regard to her legal duty in that behalf.

Our inquiry must go back to the question of whether or not Fortune could be sued and recovered against as upon a several liability, that is, was his liability under this surety bond several as well as joint with Kreielsheimer? The surety bond here sued upon is not in express terms either joint or several. Aside from its conditions, it reads as follows:

"Know All Men By These Presents, that we Hayes & Porter, Inc., a corporation, as principal being the

plaintiff herein, and J. Kreielsheimer, and John Fortune, sureties are held and firmly bound unto the defendants, Amos Wood and Alice Empson in the full sum of $3,400 lawful money of the United States, in which sum we bind ourselves, our assigns, heirs, executors and administrators firmly by these presents—"

Counsel have not given us the benefit of the citation of any authorities throwing light upon the question of whether or not the bond is, in law, several as well as joint. What independent investigation we have found time to make upon the subject convinces us that after all it is a question of intent on the part of those who execute such obligations, to be determined from the language of the instrument and the circumstances of each particular case. Looked at in this light, and having in view the purpose of the execution of such bonds and the statutes requiring their execution in order to stay proceedings upon appeal, we feel constrained to adopt the view that this is in law a several as well as a joint obligation. Having arrived at this conclusion, we think it follows as a matter of course that Fortune could have been sued upon the bond separately, and that he was severally as well as jointly liable for the whole amount recovered thereon. This being so, and Empson being no more unfavorably situated than if she had sued Fortune separately, it was not error to render judgment in her favor against Fortune alone, though she was unable to recover against the executors of his cosurety's estate.

We conclude that the judgment must be affirmed. It is so ordered. Neither Empson nor Fortune will recover costs in this court, but the executors will recover costs in this court against Empson.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ., concur.

[No. 14479. Department Two. April 30, 1918.]

AMY L. ASKEY, *Respondent*, v. NEW YORK LIFE INSURANCE COMPANY, *Appellant*.[1]

INSURANCE—LIFE INSURANCE—APPLICATION—WARRANTY—STATUTE—INTENT TO DECEIVE. Misrepresentations as to previous illness by an applicant for life insurance will not vitiate the policy, under Rem. Code, § 6059-34, providing that no misrepresentation or warranty in the negotiation of the contract shall be deemed material or defeat the policy, unless it was made with intent to deceive; it being necessary to prove the intent.

SAME—ACTION ON POLICY—MISREPRESENTATIONS — INTENT TO DECEIVE—EVIDENCE—ADMISSIBILITY. In an action on a life insurance policy, the death certificate filed by the plaintiff is not proof of any disease suffered by the deceased four or five years prior to death, and while a *prima facie* admission and evidence of statements as to past health, it is not proof of insured's intent to deceive.

SAME—MISREPRESENTATIONS—INTENT TO DECEIVE — QUESTION FOR JURY. Intent to deceive in misrepresenting past illness to be pneumonia when it was tuberculosis, made by an applicant for life insurance, who some time later died of tuberculosis, is a question for the jury, where it appears that insured had gone to California on the advice of a physician, who after a careful examination found no evidence of tubercular trouble, the wife and mother testified that there were no indications thereof, and the agent testified that he had no appearance thereof.

EVIDENCE—OPINIONS—NONEXPERTS. Upon an issue as to deceit in misrepresenting past illness of an applicant for insurance who was tubercular, nonexpert evidence of his physical appearance and condition is admissible.

APPEAL—REVIEW—HARMLESS ERROR. Upon an issue as to deceit in misrepresenting past illness of an applicant for insurance who was tubercular, it is harmless error to admit evidence that the physician examining the insured never imparted to his wife that the insured was tubercular, since it was but negative evidence of slight value.

INSURANCE—ACTION ON POLICY—MISREPRESENTATIONS—EVIDENCE—ADMISSIBILITY. In an action on a life insurance policy, upon an issue as to good faith and lack of intent to deceive in misrepresenting a past illness of an applicant for insurance who was tubercular, declarations by the insured, confirming the statements in his appli-

[1]Reported in 172 Pac. 887.

cation that his past trouble was pneumonia, made at a time when he was not contemplating insurance, are admissible, in view of Rem. Code, § 6059-34, making the insured's intent to deceive the controlling question in avoiding a policy because of false statements in the application.

SAME—ACTION ON POLICY—FRAUD—EVIDENCE OF CHARACTER—ADMISSIBILITY. In an action upon a policy of insurance, defended on the ground of fraud by the insured in making his application, evidence as to the insured's character as to truth and veracity is admissible on the issue as to his intent to deceive.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon the admission of evidence as to communications by a person since deceased, incompetent under Rem. Code, § 1214, where the fact was established by other competent evidence.

Appeal from a judgment of the superior court for King county, Jurey, J., entered May 26, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a life insurance policy. Affirmed.

H. T. Granger (Jas. H. McIntosh, of counsel), for appellant.

Bausman, Oldham & Goodale, for respondent.

PER CURIAM.—The respondent, as beneficiary in a policy of insurance issued by the appellant upon the life of her husband, George M. Askey, who died on August 9, 1916, brought suit to recover thereon. The appellant set up as an affirmative defense that the insured made application for insurance on July 30, 1915, and in response to the question, "Have you ever suffered from any ailment or disease of the heart or lungs?" answered that, in 1911, he suffered a severe attack of pneumonia for several weeks from which he had recovered, the only physician consulted by him being Dr. Klamke, of Port Gamble, Washington. To the questions whether he had ever suffered from "disease of the stomach or intestines, liver, kidneys or bladder," and "Have you consulted a physician for any ailment

or disease not included in your above answers," his response was "No." The answer to the complaint then set forth that:

"The defendant further alleges that the said statements in said application were false and were known by the said George M. Askey to be false at the time the said statements were made; that they were material, and that the same were made for the purpose of deceiving and defrauding this defendant in this; that the said Askey stated that he had suffered from the disease of pneumonia in 1911, and that he had not consulted a physician for any ailment or disease not included in said answers, whereas in truth and in fact the said George M. Askey suffered in 1911 and 1912 from the disease of tuberculosis and consulted and was treated by one Dr. Klamke for tuberculosis at that time.

"That had the defendant known that said statements were false it would not have issued the policy sued upon in this cause; that it relied upon said statements and believed the same to be true and was induced thereby to execute and deliver the said policy of life insurance."

The cause was tried to a jury, which returned a verdict for the beneficiary for the amount of the policy, upon which judgment was rendered in favor of the respondent. The insurance company appeals, assigning as errors the insufficiency of the evidence and the improper admission of evidence.

Our statute governing contracts of insurance provides that:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive." Rem. Code, § 6059-34.

In the recent case of *Brigham v. Mutual Life Ins. Co.*, 95 Wash. 196, 163 Pac. 380, we held that, under

this statute, the falsity of representations in the application for insurance would not defeat the policy, unless it should be further found that they were made with intent to deceive the insurance company. The affirmative defense set up in this case imposed the burden of establishing such fraudulent intent on the appellant. The evidence shows that the insured, in the latter part of the year 1911, while residing at Port Gamble, Washington, was suffering from some ailment which he represented in his application for insurance as being pneumonia. On the advice of his attending physician, Dr. Klamke, he went to California in January, 1912. He obtained employment there and remained for about one year and a half, returning to Port Gamble, where he intermarried with the respondent in July, 1913. He made application to appellant for insurance on July 30, 1915, being at that date twenty-six years of age. A careful physical examination of him was made by the appellant's medical examiner, who found no indications of tubercular trouble. An analysis of his urine, made at the time, showed indications of albuminuria, and on that account the appellant would not issue a policy unless the applicant agreed that his age for premium purposes be advanced from twenty-six to thirty-nine years, and that he would pay the increased premium exacted for the latter age. The policy as amended to this effect was issued on September 27, 1915.

The insured began to have trouble with his stomach and intestines in February, 1916, and had difficulty in retaining his food. In the latter part of May, 1916, he was operated on for abscess of the appendix. He never regained his health, and died in less than three months after the operation. Among the proofs of death presented to the appellant was the affidavit of Dr. Klamke, in which he stated that he treated the insured for

"Tuberculosis of the lungs—first time in 1912 (1911) —sent him to California," that the immediate cause of his death was "General tuberculosis—lungs—larynx—appendix," for which the insured had consulted him "4 years ago." This affidavit of Dr. Klamke is the only evidence tending to show that the insured had suffered from pulmonary trouble other than pneumonia. If in truth the insured had tuberculosis, there is no evidence showing that he had knowledge of the fact, other than the natural inference that one really suffering from such a disease would probably know it. Dr. Klamke was not called as a witness, and there is no proof that he ever informed his patient that he was suffering with tuberculosis. The death certificate filed by the respondent was not proof of any disease suffered by the insured four or five years prior to death. It constituted an admission by the respondent that the statement in the death certificate was probably true. Such statement constituted *prima facie* evidence which was subject to refutation, and, even allowing it full force to establish the physical condition of the insured, it was not proof of the insured's intent to deceive the company. The weight of authority is that the proof of death of an insured is conclusive only of the fact of death, and is merely *prima facie* evidence of any statements contained as to the past health of the insured. *Spencer v. Citizens' Mut. Life Ins. Co.*, 3 Misc. Rep. 458, 23 N. Y. Supp. 178; *Hancock Mut. Life Ins. Co. v. Dick,* 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; *Fidelity Mut. Life Ass'n v. Ficklin,* 74 Md. 172, 21 Atl. 680, 23 Atl. 197; May, Insurance (4th ed.), §§ 460, 465; *Insurance Co. v. Newton,* 22 Wall. (89 U. S.) 32; *Insurance Co. v. Higginbotham,* 95 U. S. 380, 390.

See, also, *Boylan v. Prudential Ins. Co.*, 18 Misc. Rep. 444, 42 N. Y. Supp. 52, where the testimony of the mother of the assured contradicting the physician's

certificate was held admissible as proof of the veracity of health statements in the application for insurance and sufficient to raise an issue upon that fact.

In rebuttal of the inference of George M. Askey's knowledge of his condition raised by the affidavit of Dr. Klamke, there is the testimony of the physician of the insurance company, who made a thorough examination of the insured and found no indications of tubercular trouble. There is also the testimony of the soliciting agent of the insurance company that the applicant had no appearance of consumptive disease and was regarded by him as a good risk. The wife and mother-in-law of the insured also testified that he had no indications of pulmonary trouble. In view of the evidence, it is apparent that the appellant failed to conclusively establish intent to deceive on the part of the insured. Viewing the evidence in the light most favorable to the appellant, it must be held that it presented such a conflict as to raise a question for the jury.

The appellant contends that it was error on the part of the court to admit the testimony of the wife and mother-in-law of the insured as to his physical condition and the absence of indications of tubercular disease. Nonexpert opinion evidence of the physical condition and appearance of an individual is generally held to be admissible. Jones, Blue Book of Evidence, § 360; *Ferguson v. Davis Co.*, 57 Iowa 601, 10 N. W. 906; *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516.

We have held such evidence competent upon the issue of intent in the case of *Goertz v. Continental Life Ins. & Inv. Co.*, 95 Wash. 358, 163 Pac. 938, where the testimony of acquaintances and associates, who had adequate opportunity for observation, was admitted for the purpose of rebutting any presumption of knowledge on the part of the insured that he was suffering at

the time with the disease from which he afterward died.

Objection is also urged against the admissibility of the testimony by the respondent to the effect that Dr. Klamke, at no time prior to her marriage nor the birth of her children, ever imparted to her information that the insured was tubercular. We think such evidence was inadmissible, but constituted nothing more than harmless error, insufficient in the light of the other facts in the case to warrant the granting of a new trial. It was negative evidence of the flimsiest character, neither proving nor disproving any of the issues.

The appellant contends that the court committed prejudicial error in allowing the respondent to testify that the insured told her, just prior to leaving for California on account of his health, that he had pneumonia; that this evidence was clearly hearsay and lacks the elements of *res gestae.*

The respondent contends that, inasmuch as the insured was charged with making false representations as to his physical condition, the declaration was admissible in order to show what he thought was the trouble with him, and hence was evidence addressed to the question of his good faith, and tending to show want of knowledge on his part that he was afflicted with any tubercular disease. The authorities are somewhat at variance upon the question of the admissibility of prior declarations of an insured in an action by his beneficiary, and fine distinctions are made in the admission or rejection of such evidence, each case often being governed by its particular facts.

In Bacon on Life and Accident Insurance (4th ed.), § 636, it is said:

"In an action by the assignee or beneficiary of the policy, declarations and admissions of the assured made at a time prior to and remote from the application, and

disconnected with any act or fact showing his condition of health, are incompetent for the purpose of contradicting the statements made in the application; but if it appear otherwise than by the declarations of assured, that such statements were untrue, then his prior declarations are admissible to show knowledge on his part of the falsity of such answers; and statements made by the assured shortly prior to his application concerning his health, in connection with facts exhibiting his then state of health, are probably admissible upon the question of the truthfulness of the answers made by him in such application."

While the last clause of the foregoing statement would seem to sustain the contention of respondent, the authorities cited as supporting it are addressed to declarations in contradiction of statements in the application for insurance. In the present case, we are concerned with declarations of the insured confirming his application and testified to by the beneficiary as made directly to herself. They were made at a time when the decedent was not contemplating insurance and when he was suffering from disease. As evidence that the insured at that time was suffering with pneumonia, such testimony should be closely scrutinized, coming as it does from the party in interest. But, bearing in mind that one of the issues is the good faith and lack of intent to deceive on the part of the insured, the question is, should the evidence be admissible for that purpose. While the general rule is that a statement made by the insured in his application for insurance cannot be impeached by evidence of his prior declarations, it is fairly well settled that, where there is substantive evidence of the falsity of such statement, proof of prior declarations is admissible for the purpose of showing knowledge of such falsity. *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Rawson v. Milwaukee Mut. Life Ins. Co.*, 115 Wis. 641, 92 N. W.

378; *Union Cent. Life Ins. Co. v. Pollard,* 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271; *Haughton v. Aetna Life Ins. Co.,* 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

If such declarations are admissible for the purpose of showing deceit, they ought, by parity of reasoning, to be admissible to show good faith. This principle is recognized in a Canadian decision, where an insured's declaration, prior to making an application for insurance, stating his age was admitted in evidence for the purpose of showing good faith in the misstatement of his age in the application. *Dillon v. Mutual Reserve Fund Life Ass'n,* 5 Ont. L. R. 434.

The question is one of first impression in this court, and seems to have seldom risen elsewhere. The rule is stated in 4 Chamberlayne, Modern Law of Evidence, § 2683, as follows:

"The nature of the issue in any particular case may render good or bad faith constituently relevant as component parts of the right or liability asserted in the action. If so, not being subject to direct observation, these phases of the mind must, like other psychological facts, be established circumstantially. Among facts which may properly be employed in such a connection are unsworn statements."

And Id., § 2652, states the rule in other language as follows:

"The existence of good faith or its opposite may be proved, in part at least, by extra-judicial statements whenever this fact is relevant. The only effective limits which can be set to the scope of such declarations are those prescribed by probative or deliberative relevancy."

Jones, Blue Book of Evidence, after discussing the relevancy of collateral facts to establish bad faith, adds in § 146:

"But, of course, on the same principle, facts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue."

See, also, *Knights of Honor v. Dickson,* 102 Tenn. 255, 52 S. W. 862, where it is said:

"Falsehood may be predicated of a misstatement of fact but not of a mistaken opinion as to whether a man has a disease when it is latent and it can only be a matter of opinion. As to what a person may have died of may be largely, if not altogether, a matter of opinion, about which attending physicians often disagree, and as to such matters their statements made can only be treated as representations and not as warranties, and if made in good faith and on the best information had or obtainable, they will not vitiate a policy if incorrect and not willfully untrue."

This rule is in line with that announced in the cases holding evidence of one's intent in doing an act may be shown by his prior declarations. See *Mutual Life Ins. Co. v. Hillmon,* 145 U. S. 285. Inasmuch as our statute makes the insured's intent to deceive the controlling question in avoiding a policy because of false statements as to health made to the insurer, the question of good faith is a very material one, and we must hold that prior declarations of the insured which tend to show good faith are admissible in evidence.

The appellant contends that the court erred in admitting evidence as to the character of the insured as to truth and veracity. One of the issues was that the insured was guilty of fraud upon the insurance company in making false representations as to his health. An exception to the general rule against this character of testimony in civil actions is allowed where fraud is imputed against a man deceased at the time of trial. *Bowerman v. Bowerman,* 76 Hun 46, 27 N. Y. Supp. 579.

This court has applied the rule under such circumstances in the case of *Rasmusson v. North Coast Fire Ins. Co.*, 83 Wash. 569, 145 Pac. 610, L. R. A. 1915C 1179, declaring such evidence admissible where the defense was that the insured had sworn falsely in making proofs of loss upon a fire insurance policy, and by reason of his death prior to trial the insured was unable to testify in denial of the charge. We think there was no error in the admission of character evidence under the circumstances of this case.

A further contention is made that the court erred in permitting the respondent to testify that her husband told her in February, 1916, that Dr. Klamke informed him he had stomach trouble. The objection is made that this testimony was incompetent, irrelevant and immaterial, and that, under the statute, Rem. Code, § 1214, a wife could not testify to communications made to her by her husband during marriage. Whether or not such testimony was improperly admitted on any ground, its admission was not prejudicial, since there was evidence that the deceased, at the period testified to, did have trouble with his stomach and appendix, undergoing an operation upon the latter organ, and that he continued in a debilitated condition until his death a few months later. The nature of the physical trouble prior to the death of the insured having been proved, any error in the admission of testimony of conversation addressed to that fact was harmless. The effect of this evidence showing death following an operation for appendicitis was to rebut the *prima facie* evidence contained in the proof of death and raise a conflict in the evidence for the determination of the jury.

A careful examination of the record leads us to the conclusion that no prejudicial error occurred in the trial. The judgment is affirmed.

[No. 14487. Department One. April 30, 1918.]

C. F. McINNIS *et al., Appellants,* v. DAY LUMBER COMPANY, *Respondent.*[1]

WATERS AND WATER COURSES—APPROPRIATION AND PRESCRIPTION—LOSS OF RIGHT—EVIDENCE—PAROL ADMISSIONS. Where the prescriptive right to maintain a dam at a certain height and overflow lands has become fully vested by adverse use for the statutory period of ten years it cannot be lost by a subsequent parol admission that the possession was not adverse or recognizing a right to have the dam lowered.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered May 14, 1917, upon findings in favor of the defendant, in an action for an injunction and for damages, tried to the court. Affirmed.

James C. Waugh and *J. W. Russell,* for appellants.

Thomas Smith and *Coleman & Gable,* for respondent.

PARKER, J.—The plaintiffs, McInnis and wife, seek a judgment to compel the defendant, Day Lumber Company, a corporation, to remove a dam maintained by it in Nookachamps creek, at its sawmill in Skagit county, which dam the plaintiffs claim causes the overflow of their land, and also seek damages for past injuries to their land so caused. Trial in the superior court for that county resulted in findings and judgment enjoining the defendant from maintaining the dam above a certain height, and awarding the plaintiffs damages for past injuries in the sum of $50. From this disposition of the cause, the plaintiffs have appealed to this court.

Plaintiffs own land bordered upon the upper end of a natural widening of the creek, called Big Lake, some

[1]Reported in 172 Pac. 844.

two and one half miles above respondent's sawmill, which is situated at the lower end of the lake. In the year 1897, Parker Brothers, a copartnership, built the dam in question in the creek just below the lower end of the lake for the purpose of raising the water a few feet to facilitate the handling of shingle bolts and logs brought to their mill there situated to be manufactured into lumber and shingles. Thereafter this mill property, including the dam, was conveyed by Parker Brothers to the J. D. Day Lumber Company, a copartnership, and thereafter it was conveyed by the J. D. Day Lumber Company to respondent, Day Lumber Company, a corporation, the present owner. The dam as originally constructed consisted of a cedar log, about four feet in diameter, laid across the bed of the creek for the foundation of the dam, and other timbers were placed on top of it so as to make the top of the dam considerably higher. Just how high the dam was originally constructed in the year 1897 is a matter of some uncertainty. We think, however, that the evidence fully warrants the conclusion reached by the trial court that, for more than ten years prior to the year 1910, the dam was continuously maintained by respondent and its grantors to at least the height of twenty-nine inches above the top of this foundation cedar log, which log is still in the same position as originally placed, and in a fair state of preservation. The changes of material with which the dam has been maintained have been only in the portions thereof above the log. Repairs made upon the dam since about 1909 have resulted in raising it several inches, possibly a foot, higher than twenty-nine inches above the foundation log. The exact extent of this raise we need not here notice. The trial court rendered judgment enjoining respondent from maintaining the dam at a greater height than twenty-nine inches above the

top of the foundation log, and awarded the appellants the sum of $50 damages for injuries to their land by the overflow thereof caused by the raising of the water more than twenty-nine inches above the top of the foundation log.

The judgment, in so far as it restrains the maintenance of the top of the dam not to exceed twenty-nine inches above the foundation log was, by the trial court, rested upon the theory that respondent had acquired the right in 1910 to maintain the dam at that height by prescription, as against appellants as owners of the land which the maintenance of the dam at that height caused to be overflowed. We agree with the trial court that the evidence calls for the conclusion that, for more than ten years prior to 1910 and up to the present time, respondent and its grantors have continuously, without any interruption whatever, maintained the dam at least to the height of twenty-nine inches above the foundation log. The evidence is quite voluminous and is not wholly free from conflict, but that it preponderates in favor of the court's conclusion, we are quite convinced. We think it would be unprofitable to review the evidence here in detail.

Counsel for appellants also contend that the maintenance of the dam and the overflow of their lands caused thereby was not in law adverse to their rights, but that respondent recognized their right to have the same discontinued. This contention is rested upon negotiations commenced between respondent and appellants in February, 1910, wherein it is claimed respondent conceded the rights of appellants as claimed by them. It is not claimed, indeed it could not be under the evidence, that there was ever anything said or done by any of the parties in interest prior to February, 1910, which would in the least impede the running of the statute in favor of respondent and its grantors in their claimed

prescriptive right to maintain the dam. Besides, we think these negotiations related to the increase of the height of the dam by respondent about the year 1910 and later, rather than to the prior maintenance of the dam. We have noticed the fact of the maintenance of the dam to a height of at least twenty-nine inches above the top of the foundation log for more than ten years prior to 1910 for the purpose of arriving at a conclusion as to what prescriptive rights respondent had then acquired, and having arrived at the conclusion that its prescriptive rights, to the extent recognized by the trial court, were perfected in the year 1910, it would seem to be of no consequence what negotiations, amounting to less than the formal conveyance by respondent of its thus acquired prescriptive right, were had in 1910 and later. It seems to be well settled law that:

"Where title has become perfect by adverse possession for the statutory period it is not lost by an admission by the holder that the possession was not adverse." 2 C. J. 256.

We find a clear statement of the rule announced by Chief Justice Reese, speaking for the supreme court of Nebraska in *Towles v. Hamilton,* 94 Neb. 588, 143 N. W. 935, as follows:

"It is elementary that, where the title has become fully vested by disseizin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed."

Treating the acquired right to overflow appellants' land as a prescriptive right rather than the acquiring of title to the land so overflowed, the law applicable would be the same. *Swan v. Munch,* 65 Minn. 500, 67 N. W. 1022, 60 Am. St. 491, 35 L. R. A. 743; *Alcorn v. Sadler,* 71 Miss. 634, 14 South. 444, 42 Am. St. 484.

These cases are directly in point, since they have to do with the question of rights acquired by the maintenance of dams causing the overflow of lands of others for the statutory period relating to the acquisition of real property and interests thereon by adverse possession or use. A title or easement right in real property is no different when acquired by adverse possession or use than when acquired by formal grant in the manner prescribed by the statute of frauds. It seems to follow, as a matter of course, that such title or right can be parted with only in the manner that a title or easement right otherwise acquired may be parted with.

Counsel for appellants cite and rely upon our decision in *St. Martin v. Skamania Boom Co.*, 79 Wash. 393, 140 Pac. 355. A critical reading of that case, we think, discloses that ten years had not elapsed since the beginning of the damages for which redress was sought, when the negotiations alleged to show use and possession by consent occurred. It seems quite clear to us that the trial court properly disposed of this case in so far as it recognized the perfected right of respondent, acquired by adverse possession and use, to maintain the dam at the height of twenty-nine inches above the top of the foundation log.

Contention is made in behalf of appellants that the damages awarded them are inadequate. We cannot so view the evidence, all of which we have read with care.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

[No. 14524. Department Two. April 30, 1918.]

E. F. WHITAKER *et al.*, *Appellants*, v. JOHN H. ELLIS, *Respondent*.[1]

INSANE PERSONS—ACTIONS AGAINST—DEFENSES—PLEADING. Purchasers at a tax sale and sale under execution of property of an incompetent person, suing to quiet title, must recover on the strength of their own title; hence defendant's guardian *ad litem*, may rely on general denials without pleading affirmative defenses.

APPEAL—REVIEW—HARMLESS ERROR — TECHNICALITIES. Where a case was fully tried on denials, error cannot be predicated upon defendant's failure to plead his affirmative defenses, as the objection is technical, and under Rem. Code, § 307, must be disregarded.

TAXATION—TAX SALES—BONA FIDE PURCHASER — INSANE PERSON. Where property of an insane person was bid in at tax and execution sales, pursuant to negotiations between the insane person and persons who were bound to pay the taxes, who procured friends to bid in the property at much less than it was worth, and caused the same to be transferred to another friend who knew the entire situation, the latter was not a purchaser in good faith, and could acquire no rights by virtue of the negotiations had with the insane person.

TAXATION—TAX SALES—PROPERTY OF INSANE PERSON — REDEMPTION—REIMBURSEMENT OF PURCHASER. Persons bidding in the property of an insane person at tax sale, under unwarranted negotiations with the insane owner, while unable to hold the land, are entitled, in an equitable suit, to be reimbursed for the amount of the taxes paid; especially in view of Rem. Code, § 9259, relating to the redemption of the lands of insane persons sold for the nonpayment of taxes by the reimbursement of the purchaser.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered June 4, 1917, in favor of the defendant, dismissing an action to quiet title, tried to the court. Reversed conditionally.

Roberts & Udell, for appellants.

John F. Chesterley, for respondent.

CHADWICK, J.—John H. Ellis was committed to the hospital for the insane in 1895, again in 1897, and

[1]Reported in 172 Pac. 881.

again in 1898. In each instance he was discharged as "improved." This means, according to the letters of the superintendent of the hospital, which were introduced in evidence, that one so discharged is not necessarily cured, but may be so improved as not to be dangerous to go at large. Ellis was discharged the last time in 1902. In November, 1916, N. H. Massie, a brother-in-law of the plaintiff, filed a complaint charging Ellis with being an insane person. He was examined by a number of physicians, who made findings that he was "not insane necessarily, but incapable of looking after himself. We recommend a guardian be appointed by the court; mentally below par." The witnesses describe Ellis variously as "sane," "insane," "queer," "off," and "cracked." That he meets up with some of these descriptions, we have no doubt. The trial judge found him to have been at all times material to this inquiry a paranoiac and unfit to attend to his own business. It will be unnecessary to review the evidence. We are satisfied that a preponderance of the evidence is with the defendant upon this issue.

Ellis was the owner of eighty acres of land which he contracted to sell to N. H. Massie, a brother-in-law of plaintiff, in 1912 for a consideration of $8,000. Massie paid $150 down and made a mortgage for $7,850 to secure the remainder. Massie paid no more than $300 on the interest, and no taxes whatever, although he had the full legal and equitable title, subject only to the lien of the mortgage. At the time of the sale, the last half of the 1911 taxes were due and unpaid, and they were not thereafter paid by Ellis or Massie. Massie, being unable or unwilling to meet the payments due upon his mortgage, proposed a reconveyance of the land. Out of the negotiations of the parties, Ellis agreed to remit the sum of $500 upon condition that Massie would retain the land and plant forty acres to

orchard. This he did. In the summer of 1916, Massie had an understanding with plaintiff Whitaker that he, Whitaker, would buy the land if he could get it for $2,000 or less. A foreclosure proceeding had been brought by one Huston, who had theretofore taken out certificates of delinquency. Massie borrowed the money of Mr. Heath's bank to pay the amount due at the time of sale and procured Mr. Heath to bid in the land. The sale occurred on July 29, 1916, and on the very next day Mr. Heath conveyed the land by quit-claim deed to plaintiff. The tax sale did not cover all of the land. There were two small fractional pieces that were not included. The John Deere Plow Company had theretofore obtained a judgment against Ellis. Massie solicited a friend in the east to buy this judgment, and in order to make title to all of the land, including the part not included in the tax sale, he caused an execution to issue, and the land was sold in September, 1916, and bid in by Mr. Heath. The money to pay this judgment was borrowed of the bank upon the note of Massie. In April, 1916, after Massie had notice of the pendency of the tax foreclosure proceeding, he took up the matter of reconveying the land to Ellis, and it was agreed that Ellis would take the land back. Massie executed a deed in April. About ten days before the tax sale, or about the 20th of July, he left it at the bank for Ellis. We are not entirely satisfied that the testimony shows a legal delivery, but we shall assume that it was. The note and mortgage were surrendered, but they were never canceled of record. On January 6, 1917, Heath assigned his certificate of sale to plaintiff. Plaintiff then put the certificate and the deed, which had been executed by Mr. Heath in July, of record, and on February 3d began this action to quiet his title. He set up his ownership of the land, that the mortgage was outstanding and unsatisfied, and

that Ellis persisted in claiming to be the owner of the land. Ellis made default, after which counsel for plaintiff moved that the default be opened and a guardian *ad litem* appointed for the reason:

"That the mind of the defendant John H. Ellis may have become deranged by reason of the loss of his property through legal proceedings, so that he is in need of the care and attention of a guardian *ad litem,* and that no general guardian has been appointed."

Mr. John F. Chesterley was accordingly appointed guardian *ad litem,* and set up two defenses: first, that Ellis was at all times so insane and so mentally incompetent that his estate would not be bound by the tax judgment and sale, and that Whitaker was not an innocent purchaser for value of the land; and second, that the plaintiff and Massie were legally bound to pay all the taxes, that they conspired to bring about the tax foreclosure proceeding by the nonpayment of the taxes, and that they conspired to defeat the title and interest of Ellis by purchasing, through the intervention of an agent, the outstanding judgment, and afterwards caused the property to be sold on execution and bid in by another acting for them, all for the purpose and with the intent of defeating the lien of the mortgage theretofore made by Massie. The court found that Ellis was at all times mentally irresponsible, and refused to grant the relief prayed for.

Counsel first insist that the decree of the court should be reversed because the guardian *ad litem* did not plead any affirmative defenses, nor did he ask any affirmative relief by way of cross-complaint. It is complained that the method pursued by the guardian *ad litem* is a collateral attack, and that he should have filed a cross-complaint so as to bring the issue before the court directly. It is hard for us to follow the reasoning of counsel. It was the duty of the guardian *ad*

litem to hold plaintiff to strict proof, and this could be done by a general denial, for whatever presumptions attend the record title of plaintiff, when he began his action to quiet title he opened all the doors of equity, for, as in ejectment, he must recover upon the strength of his own title, and not upon the weakness of that of his adversary. *Brown v. Bremerton,* 69 Wash. 474, 125 Pac. 785. Moreover, the case has been tried and all the facts have been put before the court, and we could not send a case back for a retrial upon an objection which, in the light of the whole record, has become technical. Under the statute, Rem. Code, § 307, we are warranted in treating the defenses as affirmative defenses.

Plaintiff is brother-in-law and friend of Massie, and a friend and neighbor of Ellis. He knew the situation, he knew that Massie was legally and morally bound to pay the taxes accruing since 1911. He offered, himself, or was persuaded, to be a purchaser of the land if it could be bought for $2,000 or less, knowing that it could not be so bought unless the mortgage of $7,850 was paid off or disposed of in some other way. On the very next day after the property had been bought in by Mr. Heath, he accepted a deed from Heath, the consideration being the amount paid at the sale and no more; although he was charged with a knowledge of the law and the fact that the tax title destroyed all other titles, and that the owner of the land, granting that Mr. Heath was the owner of it, was in a position to convey the full title, presumptively, at least, and was entitled to receive a full or fair value, he did not put his deed of record until after the property had been again sold under the execution thereafter issued on the John Deere Plow Company judgment, showing clearly that the second sale was procured for no other purpose than to aid the tax title, and in pursuance of the pur-

pose of plaintiff to buy, and of Massie to procure the land for him, for a sum less than $2,000, and at the same time discharge his own obligation.

Plaintiff was not a purchaser in good faith and can claim no title in virtue of the negotiations had between Ellis and Massie, or in virtue of the execution sale; but it does not follow that the tax title is void, or that plaintiff is to be barred of his legal rights because his case is wanting in equity. The land was subject to the taxes levied upon it. The property of persons laboring under a disability is subject to taxation as is other property, unless it is exempted by statute.

"The fact that land belongs to a person who is under legal disabilities, as a minor or a feme covert, does not prevent the sale of the same for the non-payment of taxes assessed against it, nor will it prevent the title to the same from passing by a tax deed issued pursuant to such sale. It is true that the statutes almost invariably allow to persons so circumstanced a sufficient period after the removal of the disability, within which to exercise the right of redemption from a tax sale." Black, Tax Titles (2d ed.), p. 334, § 270.

Our statute provides for the redemption of the property of an insane person when sold for taxes.

"If the real property of any minor heir, or any insane person, be sold for nonpayment of taxes or assessments, the same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed upon the terms specified in this section on the payment of interest at the rate of twelve per cent per annum on the amount for which the same was sold, from and after the date of sale, and in addition the redemptioner shall pay the reasonable value of all improvements made in good faith on the property, less the value of the use thereof, which redemption may be made by themselves or any person in their behalf." Rem. Code, § 9259; as amended Laws 1917, p. 586.

We are willing to subscribe to the decree of the lower court in so far as it holds that all contracts made with Ellis in the carrying out of the plan to get title to the land are voidable, but we cannot deny plaintiff the right which the statute gives him, that is, a right to be reimbursed for the amount of taxes that he has paid out. At the time this action was begun, Ellis had a right under the statute to redeem, and plaintiff, having asked for equity, should be content with no less than equity. The equities of the case demand that Ellis be now given an opportunity to redeem.

It is said in the brief, although it is no part of the record, that a general guardian has been appointed for the defendant. If this be not so, we suggest that, upon the going down of the remittitur, a guardian be appointed; that he be made a party to this action, and that he be given the privilege of redeeming the land upon the payment of the amount which plaintiff paid upon the tax sale and interest (Rem. Code, § 9259), and the amount that plaintiff paid for the judgment of the John Deere Plow Company, with interest at six per cent per annum from the time of payment until redemption.

We do not direct a redemption; we leave this question to the judgment of the general guardian, subject, of course, to the approval and order of the court below. If a redemption is not made within ninety days after the remittitur goes down, the judgment will be reversed. Appellant will recover his costs in this court.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14559. Department Two. April 30, 1918.]

E. J. FOLEY *et al.*, *Appellants*, v. PIERCE COUNTY SCHOOL DISTRICT No. 10, *Respondent*.[1]

SCHOOLS AND SCHOOL DISTRICTS—ACTIONS AGAINST—"MAINTAIN AN ACTION"—STATUTES. Laws 1917, p. 332, providing that no action shall be commenced or maintained against a school district for non-contractual acts or omissions of officers or employees relating to playgrounds, prohibits the plaintiff from prosecuting an appeal from an adverse judgment, after the taking effect of the law; since to prosecute an appeal is to maintain an action.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 1, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death. Affirmed.

Gordon & Easterday, G. C. Nolte, and *Carroll A. Gordon,* for appellants.

Fred G. Remann, Harry E. Phelps, and *A. B. Bell,* for respondent.

PER CURIAM.—This action was begun on the 27th day of November, 1916, to recover damages for the death of a minor son of appellants. A trial resulted in a verdict in favor of the defendant. Judgment was entered on the 1st day of June, 1917. Thus the case presents a perfect corollary to *Bruenn v. North Yakima School District No. 7,* 101 Wash. 374, 172 Pac. 569. To prosecute an appeal is to maintain an action. The case falls under the bar of the act of 1917, Laws of 1917, p. 332. Affirmed.

[1]Reported in 172 Pac. 819.

[No. 14592. Department Two. April 30, 1918.]

THE CITY OF EVERETT, *Plaintiff*, v. JAMES M. McCULLOCH, *as Sheriff of Snohomish County, Defendant.*[1]

LIENS—FORECLOSURE—SALE—TITLE—PARTIES CONCLUDED. Where the sheriff took a taxicab from the possession of a city by virtue of notice and proceedings in foreclosure of a chattel lien thereon, under Rem. Code, §§ 1104-1109, and the city failed to contest the matter by removing the foreclosure to the superior court as it might have done under the statute, it cannot claim that the foreclosure sale is irregular or replevy the property from the sheriff on account of irregularity or minor defects which should have been determined by the superior court if the city claimed any interest in the property.

Cross-appeals from a judgment of the superior court for Snohomish county, Alston, J., entered July 24, 1917, upon findings favorable to the plaintiff, in an action of replevin, tried to the court. Reversed.

Wm. A. Johnson, for plaintiff.

Ogden & Clarke and *Joseph Oakland,* for defendant.

MOUNT, J.—This action was brought by the city of Everett to recover possession of a certain Ford taxicab which was taken by the sheriff from the possession of the police officers of that city. On the trial of the case, the court found that the value of the taxicab was $250; that the only interest which the city had was the right of possession during such reasonable time as might be necessary to determine what disposition should be made of the taxicab; and that the city had no authority to confiscate the taxicab, other than to require the owner to put up a bond conditioned that the taxicab would not be used for the unlawful sale or disposal of intoxicating liquor for the period of one year. The

[1]Reported in 172 Pac. 863.

court concluded that the city was entitled to the return of the taxicab, and, in case return could not be had, to damages in the sum of $1. The city has appealed from that part of the decree awarding damages, and the defendant has appealed from that part of the judgment to the effect that the city was entitled to the possession of the taxicab.

The facts are as follows: In January, 1917, three persons brought the taxicab to the city of Everett. These persons escaped from the taxicab. Two of them were arrested and the other was never apprehended. Within the taxicab was found a large amount of bottled whiskey. The men who were arrested forfeited their bail and were never brought to trial. The cases are still pending in the police court of the city of Everett. Two months later, one A. D. Scott demanded the taxicab from the police department of the city of Everett, claiming that he had a chattel lien upon the taxicab for work previously done thereon. Delivery was refused, and he thereupon proceeded to foreclose his chattel lien by notice and sale under the provisions of §§ 1104 to 1109, Rem. Code. The sheriff took possession of the taxicab, served notice of sale upon the mayor, the commissioner of public safety, and the chief of police of the city of Everett, and on the 11th day of April the taxicab was sold at public auction. The proceedings for the foreclosure of the lien were not removed to the superior court of Snohomish county, but prior to the sale of the taxicab and on or about the 5th day of April, the plaintiff began this action against the defendant to recover possession of the taxicab.

This case is controlled by the case of *Mack v. Doak*, 50 Wash. 119, 96 Pac. 825. That was a case where property was mortgaged, and after the mortgage became due, the mortgagee proceeded to foreclose his mortgage. The mortgagors did not contest the foreclosure

in the superior court, but permitted the sheriff to proceed with the sale, as was done in this case. Thereafter the mortgagors attempted to recover damages for the wrongful taking of the property described in the mortgage. In that case we said:

"The foreclosure here involved was commenced and conducted by notice and sale in exact compliance with the requirements of Bal. Code, §§ 5870-5875 (P. C. §§ 6535-6540). Section 5870 provides that foreclosure may be made by notice and sale; § 5871 directs what the contents of the notice shall be, and § 5872 expressly provides that such notice shall be sufficient authority for the sheriff to take the property into his immediate possession. This provision makes the notice process sufficient to authorize the sheriff to seize the property without the consent of the mortgagor, and against his protest. Any other construction would render the statute ineffective. Section 5876, *supra,* provides a method by which the mortgagor may protect himself against an unauthorized foreclosure, or contest the amount claimed to be due. The appellants did not see fit to avail themselves of the provisions of this section, but permitted the foreclosure and sale to proceed without further protest or action upon their part, and thereafter commenced this action for damages. Under these circumstances, the sheriff was fully protected in all of his proceedings by the notice which had been delivered to him, and the appellants are not entitled to recover."

See, also, *Allen v. Morris,* 87 Wash. 268, 151 Pac. 827.

We think that rule is controlling in this case. Here the city attempts to maintain an action in replevin against the sheriff, who seized the property under the foreclosure proceeding and sold it by authority of that proceeding. The city now attempts to maintain that the sale was irregular because of some minor defects in the recording of the lien notice and the dates fixed for the sale; but these were matters which should have been determined by the superior court of that county, if the city claimed any interest in the taxicab. The city

did not seek that remedy, and it is now too late to claim ownership or the right of possession of the taxicab. The only interest which the city could possibly have in this taxicab, under the city ordinance, is the right to require a bond that the taxicab shall not be used for the purpose of sale of intoxicating liquors for a period of one year. The city apparently did not require that bond to be given prior to seizure by the sheriff. The trial court, therefore, should have dismissed the action.

The judgment is reversed, and remanded with direction to dismiss the action.

ELLIS, C. J., FULLERTON, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14610. Department Two. April 30, 1918.]

HARRY PARKER, *Respondent*, v. INDUSTRIAL INSURANCE DEPARTMENT, *Appellant*.[1]

MASTER AND SERVANT — WORKMEN'S COMPENSATION — DECISION OF INSURANCE DEPARTMENT—APPEAL—STATUTES. Questions going to the classification of an injured workman, and his right to participate in the insurance fund, are subject to review on appeal from the insurance department as "questions of fact," within the meaning of Rem. Code, § 6604-20, providing for appeals in so far as a department decision rests upon questions of fact; "questions of fact" meaning all facts necessary to be determined before a workman is classed as a beneficiary, and matters of "discretion," as to which there is no appeal, referring to matters pertaining to the administration of the fund after a workman is classified.

SAME—WORKMEN'S COMPENSATION—PARTIAL DISABILITY—RIGHT TO BENEFIT. Where it is conceded that a beneficiary seeking recovery for "permanent partial disability" under Rem. Code, § 6604-5 (f) of the workmen's compensation act, is suffering from neurosis or hysterical paralysis to such an extent as to be partially disabled, although he may recover, he is entitled to the benefits of Id., § 6604-5(d), providing for cessation of benefits upon recovery and the continuance of proportionate payments so long as the present earning power is only partially restored.

[1]Reported in 172 Pac. 830.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered July 7, 1917, upon findings in favor of the plaintiff, upon appeal from an order of the industrial insurance commission, after a trial on the merits to the court. Modified.

The Attorney General and *Howard Waterman, Assistant,* for appellant.

Nuzum, Clark & Nuzum, for respondent.

CHADWICK, J.—The facts in this case are stipulated. The statute fixes no form of procedure in cases of this kind. Respondent appealed from an order of the industrial insurance department denying him an award as one suffering from a permanent partial disability. When the case came on for hearing before the court, witnesses were introduced. After hearing the testimony of the attending physician and other witnesses as to the condition of the respondent, the court held that the order of the department should be reversed, and directed that an order be entered classifying respondent as one suffering from a permanent partial disability, and that an allowance be made therefor.

Appellant maintains: first, that the decision of the department is a matter resting entirely within its discretion and is not subject to review, or, if so, that there is no showing that it abused its discretion. This contention is rested upon the case of *Sinnes v. Daggett,* 80 Wash. 673, 142 Pac. 5, where we held that we would not review an order of the department fixing a decree of permanent partial disability and the amount of the award. But it seems to us that this case does not support appellant's contention.

After the status of an injured employee has been fixed by the department, whether acting upon its own judgment or as a legal conclusion from the testimony

or admitted facts, the courts will not interfere with the discretion of the department to determine the amount to be paid from month to month, for it is provided that the discretion of the department shall not be subject to review. Rem. Code, §§ 6604-5, 6604-20.

The meaning of the act is that all questions going to the classification of an injured workman and his right to participate in the insurance fund are questions of fact and subject to review, upon appeal, by court or jury; but the amount of the award upon a proper classification is a matter resting in the broad discretion of the department and will not be interfered with:

"Unless, possibly, their decision might be reviewed by the courts upon such a question were they charged with capricious or arbitrary action in fixing the amount of their award." *Sinnes v. Daggett, supra.*

Whether an injured employee comes within one class or another is a fact, and an injured workman may not be made subject to an erroneous classification without a right of review. As we read the statute, this is expressly provided for.

"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision (1) of section numbered 6604-5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review." Rem. Code, § 6604-20.

That the department is bound by a finding of fact and may not limit its legal effect by rule, is held in *Kline v. Industrial Insurance Commission,* 101 Wash. 365, 172 Pac. 343.

Were we to adopt the theory of counsel, it would be to hold, in effect, that there is no appeal under § 6604-20, for it could be urged that the classification of a workman was as much within the discretion of the department as the fixing of the amount of the award. "Questions of fact," within the meaning of the act, means all questions resting in fact, and all facts necessary to be ascertained before a workman is classed as a beneficiary, and upon which his classification is made. Discretion means the conduct of the department with reference to all matters pertaining to the administration of the claim after the workman is properly classified.

It is next contended that the facts sustain the findings and conclusions of the department, and that respondent has not overcome the legal presumption that the department's decision is correct. The act provides that:

"In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same." Rem. Code, § 6604-20.

The witnesses for the department all agree that respondent has a very highly nervous organism, that he is not suffering from any organic lesion, and that there is nothing shown in the reflexes that would warrant the condition of the respondent, which is described variously by the experts as neurosis, hysteria, hysterical paralysis, neurasthenia, and hypochondriasis. It is not contended by counsel or by the experts that the respondent is a malingerer or a faker. He drags his right leg, and is unable to advance it beyond the line of his body when walking. His right arm is affected in somewhat the same way. It has a tremor that baffles the skill and knowledge of the physicians who have examined him. They all agree, however, that his

condition is real; but they agree with equal unanimity of judgment that it may pass away at any time.

This being the state of the record, it is contended that the judgment of the court should be reversed and the order of the department affirmed, because the infirmity is not "any other injury *known in surgery* to be permanent partial disability." Rem. Code, § 6604-5(f). But we think it is unnecessary to follow the theories of counsel on either side with reference to the construction of this statute. It may be that the statute is deficient in that it will not permit an award to be made where a person is suffering from a nervous affliction, so long as there is a possibility of his recovery, or because his injury or infirmity is unknown in surgery; but whether this be so or not, upon the admitted facts respondent is entitled, pending his final recovery, or until such time as the physicians may be agreed that he cannot recover, to the benefits of the law. The department struck off his allowance at the time he returned to work, although the testimony shows that he was not able to do work that he had done before; that he was given very much lighter work and favored in every way by his employer; that the most that he had earned was $3 a day, whereas his regular wage had been $4 a day. It further appears that respondent had not been able to work all of the time. It seems to us that the law makes provision for a case like this.

"As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old." Rem. Code, § 6604-5(d).

Instead of cutting off respondent's allowance altogether, the department should have made an order

covering this difference between the present earning capacity of the respondent and his former earning capacity. Considering, then, the spirit of the law, that an injured workman in extra hazardous employment shall have "a sure and certain recovery," and the letter of the law as we conceive it to be, the case will be remanded to the superior court to be from thence transmitted to the department with directions to make such an order as will reasonably cover the difference in the wage-earning power of the respondent. It is so ordered.

ELLIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 14611. Department One. April 30, 1918.]

CRANE COMPANY, *Respondent*, v. MARYLAND CASUALTY COMPANY, *Appellant*, J. G. MUSGRAVE *et al.*, *Respondents*.[1]

STATES—CONTRACTOR'S BONDS—LIABILITY OF SURETY—SUBLETTING. Where a subcontract on a state building was not consented to or recognized by the state or bonding company, there was no such assignment or "subletting" as to release the surety on the contractor's bond, under the clause therein providing that the contractor shall not assign the contract or sublet any portion thereof without the written consent of the board of control and the bonding company; the clauses meaning only that there shall be no substitution of parties without the written consent of both the state and the surety.

SAME—CONTRACTOR'S BONDS—LIABILITY OF SURETY—SUPPLIES TO SUBCONTRACTOR. A contractor's bond given under Rem. & Bal. Code, §§ 1159 and 1161, for the benefit of all laborers and materialmen and all persons "who furnish subcontractors with provisions and supplies" for carrying on the work, covers supplies furnished to any subcontractor which were actually used in the building.

Appeal from judgments of the superior court for King county, Gilliam, J., entered September 8, 1917,

[1]Reported in 172 Pac. 866.

upon findings in favor of the plaintiff and certain defendants, in an action on a contractor's bond, tried to the court. Affirmed.

Grinstead & Laube, for appellant.

Walter S. Fulton, for respondent Crane Company.

Farrell, Kane & Stratton, for respondents Musgrave *et al.*

PARKER, J.—This is an action upon a bond, executed by the defendant Maryland Casualty Company, as surety, and Beers Building Company, as contractor and principal, as provided by Rem. Code, §§ 1159-1161, relating to bonds of contractors to secure laborers, mechanics, subcontractors and materialmen furnishing labor and material for the carrying on of public work. Trial in the superior court for King county sitting without a jury resulted in findings and judgment in favor of the plaintiff, Crane Company, and against the defendant casualty company in the sum of $2,190.99, and a judgment in favor of the defendants Musgrave and Blake, upon their cross-complaint against the defendant casualty company, in the sum of $130.62. From this disposition of the cause, the casualty company has appealed to this court.

On October 7, 1915, the state of Washington, by its board of control, entered into a contract with Beers Building Company by which that company agreed to furnish the labor and material for, and to construct, the plumbing and heating system of the administration building of the State Institute for the Blind, at Vancouver, according to plans and specifications prepared therefor and by reference made a part of the contract. The specifications so made part of the contract contained, among other provisions, the following:

"The contractor shall not assign this contract nor sublet any portion thereof without the written consent of the board of control and the bonding company."

Beers Building Company was to receive as compensation for the work the sum of $7,260, payable in monthly installments as the work progressed, on the basis of 85 per cent of the value thereof, the balance to be paid in thirty days following the completion of the work. On October 13, 1915, the bond here sued upon was executed by Beers Building Company, as principal, and the defendant Maryland Casualty Company, as surety, in the sum of $7,260. It contained recitals and conditions as the law required as follows:

"This bond is executed in pursuance of sections 1159 and 1161 of Remington and Ballinger's Annotated Codes and Statutes of the state of Washington, as amended by chapter 28 of the Session Laws of 1915, and is subject to all of the provisions thereof, and is entered into with the state of Washington, for the use and benefit of all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of the work covered by the contract entered into on the 7th day of October, 1915, between the above bounden principal, Beers Building Co., and the said state of Washington, for the plumbing and heating system of the administration building for the State Institution for the Blind at Vancouver, Washington, according to the terms and conditions of said contract.

"And the conditions of this obligation are such that if the said principals shall faithfully perform all the provisions of said contract not in conflict with said chapter 28 of the Laws of 1915, and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors with provisions and supplies for the carrying on of such work . . . then this obligation shall be null and void; otherwise to remain in full force and effect."

On November 19, 1915, Beers Building Company entered into a contract with the defendants Musgrave and Blake by which they were to furnish the labor and material for, and to construct, the plumbing and heating system as contracted for by Beers Building Company with the state. Musgrave and Blake were to receive from Beers Building Company as compensation therefor the sum of $7,000, payable in monthly installments as the work progressed, on the basis of 80 per cent of the value thereof, the balance to be paid in thirty days following the completion of the work, but all such payments to be made after monthly payments made by the state to Beers Building Company on its contract. By the terms of the original and subcontracts, the work was to be completed by September 15, 1916. The work was to be done under the supervision of the state's architect, who was also to make the estimates for the monthly payments as the work progressed. Musgrave and Blake proceeded with the work under their contract, and between February 1, and June 28, 1916, Crane Company furnished to them plumbing goods and supplies for the work of the reasonable value of $3,207.93, of which there remains unpaid and due to the Crane Company the sum of $2,-190.99. All of this material was furnished by Crane Company for, and actually went into the construction of, the plumbing and heating system of the building, and was suitable therefor. Musgrave and Blake did not complete the work, but their failure to do so was because of the failure of Beers Building Company to pay them according to the terms of their contract, Beers Building Company having received at least $1,750 on May and prior installments upon its contract with the state, no part of which was paid by it to Musgrave and Blake. For this reason, Musgrave and Blake quit the work the last of June, 1916, leaving it

uncompleted. Beers Building Company having neglected to proceed with the work, the board of control declared its contract forfeited and at an end, and after tendering the completion of the work to the casualty company, as surety, and it also neglecting to proceed with the work, the board of control caused the work to be completed. The work and material furnished by Musgrave and Blake, including that furnished to them by the Crane Company, less the payments made to them by Beers Building Company, amounted to $130.62 in excess of the amount due Crane & Company, measured by the terms of Musgrave and Blake's contract with Beers Building Company, and was reasonably worth that amount. No formal written consent was ever given by the board of control or the casualty company to the making of the subcontract between Beers Building Company and Musgrave and Blake. That contract was never recognized by the board of control or its architect as in any sense a substitution for the contract between Beers Building Company and the state. In other words, the state at all times looked to Beers Building Company for the completion of its contract, and in so far as the board of control or the state's architect directed Musgrave and Blake in the performance of the work, such direction was to Musgrave and Blake merely as the representatives of Beers Building Company.

It is contended in behalf of appellant casualty company that it is not liable upon its bond to either Musgrave and Blake or Crane Company, because neither it nor the state consented in writing or otherwise to the making of the subcontract between Musgrave and Blake and Beers Building Company. Many authorities are cited and reviewed by counsel to support the proposition that the stipulation in the contract between Beers Building Company and the state that it should

not "assign" nor "sublet" the contract, or any portion thereof, without the written consent of the "board of control and the bonding company" is a valid and binding stipulation. We may concede this for the sake of argument, yet we think this falls far short of calling for a holding in this case that the casualty company is not liable upon its bond to both Musgrave and Blake and Crane Company. Reading this stipulation in the contract between Beers Building Company and the state in the light of the express condition in the bond and the statute in pursuance of which the bond was executed, it seems to us that the stipulation means nothing more than that no assignment of the contract and no subcontract made thereunder without the written consent of the board of control and the bonding company shall be of any avail in the working of a change in the contractual relations and the obligations arising thereunder as between the state, Beers Building Company and the bonding company which should thereafter become surety upon the bond. In other words, this provision, we think, means only that there shall not be any substitution of parties in place of Beers Building Company in its contract with the state, releasing that company from any obligation under its contract without the consent of both the state and the bonding company which should thereafter become surety upon the bond. Apparently this stipulation was to guard against the possibility of an impairing of the rights of the state against Beers Building Company and the surety, and also render certain that there should be no impairment of the rights of those for whose benefit the bond should be given, as against the surety thereon.

There was no effectual assignment or subletting of the original contract in this sense, because the subcontract was not consented to by either the state or the

casualty company, and besides, it seems quite apparent to us that there was no intention on the part of Beers Building Company and Musgrave and Blake that there should be any assignment or subcontract in this sense. This seems plain from a casual reading of the subcontract entered into between them. The state, as contemplated by the terms of this contract, was to pay Beers Building Company, and that company was to pay its subcontractors, Musgrave and Blake, just as it would pay laborers or materialmen. It is equally plain that the state never regarded this contract in any other light. The board of control continued at all times to look to Beers Building Company for the completion of its contract, until its rights thereunder became forfeited and were put an end to by the board of control because of its failure to perform its contract. We conclude, therefore, that Musgrave and Blake were never intended to become, and never did become, subcontractors within the meaning of the above quoted provision in the original contract between Beers Building Company and the state, prohibiting the assigning and subletting of that contract by Beers Building Company without consent of the board of control and the bonding company. We are equally well satisfied that Musgrave and Blake did become, and were intended by all parties to become, subcontractors within the meaning of the bond and the statute in pursuance of which it was executed, and that Musgrave and Blake thereby became in legal effect the agents of Beers Building Company for the purchase of plumbing supplies for the carrying on of the work, in pursuance of which agency they purchased the material from Crane Company.

Contention is made in behalf of appellant casualty company that there was no privity of contract between Crane Company and Beers Building Company render-

ing it liable upon its bond to Crane Company. What we have already said seems to us to effectually answer this contention, in view of the express provisions of the statute and the bond. The supreme court of the United States, in *Hill v. American Surety Co.*, 200 U. S. 197, seems to take the view that a surety upon a bond executed under a statute seemingly less comprehensive in terms than ours is liable to those furnishing material even indirectly through a subcontractor to the contractor, though the statute and bond given in pursuance thereof did not expressly so provide, but provided only for the payment by the surety to persons supplying the contractor with labor or material. That case was originally determined in the superior court for King county, in this state, and there being less than $200 involved, and that court being by our constitution the court of last resort as to such cases, the case was taken directly by writ of error to the supreme court of the United States. It was a suit upon a bond given in pursuance of a Federal statute entitled "An act for the protection of persons furnishing material and labor for the construction of public works" (act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1916, § 6923]), wherein it was provided that the bond should be conditioned that the contractor "shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work." The contractor sublet a portion of the work. The subcontractor employed Hill, who sought recovery upon the bond. It was argued that Hill did not come within the meaning of the statute and bond, in that he did not furnish work to the contractor because such work was not directly so furnished, but only to the subcontractor, and the statute was silent as to the furnishing of work or material to a contractor through a subcontractor.

Disposing of this contention, Justice Day, speaking for the supreme court of the United States, said:

"In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials."

Our statute not only in express terms secures subcontractors, but in equally express terms it secures those who furnish "subcontractors with provisions and supplies for the carrying on of such work." We do not have to go even to the extent the supreme court of the United States did in the *Hill* case in order to hold the casualty company liable to Crane Company in this case.

Contentions are made by counsel for appellant casualty company against the judgment rendered in favor of Musgrave and Blake. It seems to us that these contentions present only questions of fact, that is, as to the amount due Musgrave and Blake and as to their being in default upon their subcontract. We

think the evidence fully warrants the conclusion that they were not in default and that they quit work only because Beers Building Company neglected to pay them according to the terms of their subcontract, and that the evidence also fully warrants the conclusion that Musgrave and Blake were entitled to receive from Beers Building Company the $130.62 awarded them in excess of the $2,190.99 awarded Crane Company, who had furnished them plumbing supplies in the carrying on of the work.

Both judgments are affirmed.

ELLIS, C. J., FULLERTON, WEBSTER, and MAIN, JJ., concur.

[No. 14635. Department One. April 30, 1918.]

ABERDEEN STATE BANK, *Appellant*, v. SPOKANE PAVING & CONSTRUCTION COMPANY *et al.*, *Respondents*.[1]

COUNTIES—CONTRACTOR'S BONDS—NOTICE OF CLAIM—SUFFICIENCY. Mere notice of an assignment by the contractor of the reserve fund due him, is not a compliance with Rem. Code, § 1161, requiring, as a condition precedent to action on the contractor's bond, a notice of claim against the bond, stating that the party has a claim against the bond, designating the amount, the names of the principals and sureties and describing the work, where the assignment did not contain any of the required essentials and was not filed with the county auditor as required of the statutory notice.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered June 2, 1917, upon findings in favor of the defendants, in an action on a contractor's bond, tried to the court. Affirmed.

R. E. Taggart, for appellant.

W. H. Abel (Senn, Ekwall & Recken, of counsel), for respondent.

[1]Reported in 172 Pac. 827.

FULLERTON, J.—In August, 1913, the county of Chehalis, the name of which has since been changed to the county of Grays Harbor, entered into a contract with the Spokane Paving & Construction Company by the terms of which the construction company agreed, for a stated consideration, to make certain designated improvements on a county road in that county. The contract provided that payments should be made in county warrants, partially as the work progressed, on monthly estimates not to exceed seventy-five per centum of the amount earned, and the remainder within ten days after the completion of the contract and its acceptance by the county. On the execution of the contract, the construction company entered into a bond to the state of Washington with the respondent Aetna Accident & Liability Company as surety, conditioned as required by statute. After entering into the contract and giving the bond, the construction company made an arrangement with the appellant, Aberdeen State Bank, by which the bank agreed to advance sufficient money to take care of the pay-roll of the construction company and take in repayment of the money advanced county warrants received by the contractor on the monthly estimates. Under this arrangement, money was advanced by the bank, but repaid only in part, the amount unpaid amounting on December 24, 1913, to $1,028.58. On the last named date, the bank took from the construction company an assignment of the reserved payments withheld by the county and filed the same with the county auditor. As this assignment is material in the consideration of the questions raised by the appellant, we set it forth at length:

"Assignment of Warrants.

"To the auditor and treasurer of Chehalis county, Washington, and to the county commissioners of said county:

"For a valuable consideration, the Spokane Paving & Construction Company, a corporation, does hereby set over to the Chehalis County Bank, a corporation, having its principal place of business in Aberdeen, Washington, warrants held back by the county of Chehalis, state of Washington, in the sum of $1,028.58, being the amount reserved by the said county under its contract with the said Spokane Paving & Construction Company for the construction of a portion of the highway in Chehalis county, known and designated as the Hanson road, and said Spokane Paving & Construction Company hereby directs and authorizes the auditor of Chehalis county, Washington, to turn over to the said Chehalis County Bank warrants in said sum, when the same becomes payable. This assignment to the said Chehalis County Bank is made in good faith, not as a release or satisfaction, but for the purpose of securing the payment to the said bank of the sum hereinbefore mentioned, which said sum of money is being advanced by the said bank to the Spokane Paving & Construction Company to pay for labor done and performed for the Spokane Paving & Construction Company, in the construction of said highway.

"In Witness Whereof, The said Spokane Paving & Construction Company has caused its corporate name and seal to be hereunto subscribed and affixed, and these presents to be executed by its officer thereunto duly authorized, this 24th day of December, 1913.

"Spokane Paving & Construction Co.,
"By Henry L. Lilienthal, President."

The construction company only partially completed the work, finally abandoning it early in the month of February, 1914. After the work had been so abandoned, the respondent surety company took over the work and completed it to the satisfaction of the county on September 8, 1914, at which time the work was finally accepted. On the completion of the work, the county paid to the contractor the unpaid portion of the contract price, including the reserved part earned by the construction company covered by the appellant's

assignment, leaving its claim unsatisfied. In completing the work the surety company expended over and above the amount it received the sum of $3,641.40, suffering a loss in that sum.

In this action the appellant sought to recover against the county and the surety company for its unsatisfied claim. In the court below it relied for recovery against the county upon the assignment before set forth, and against the surety company upon the same ground, and the further ground that its claim was a charge against the bond of the surety company under the provisions of the bond obligating the surety to pay "all just debts, dues, and demands incurred in the performance of the work" in the payment of which the contractor should make default. A formal statutory notice of its claim was filed by the appellant with the county auditor on February 9, 1915.

On the facts shown, the trial court held that there could be no recovery, either against the county or the surety company. In this court the appellant concedes that the judgment is correct in so far as it rests upon the assignment feature of the written assignment before set forth, under the rule of this court announced in *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*, 97 Wash. 211, 166 Pac. 620, and the cases there cited. It concedes also that the formal notice of its claim filed with the county auditor is insufficient to bind the surety, because given more than thirty days after the completion of the contract and the formal acceptance of the work by the affirmative action of the county commissioners. Its contention now is that the assignment itself was a sufficient notice of the claim against the surety and, being given in time, permits a recovery against the surety as for money advanced by it to pay just debts, dues, and demands incurred by the contractor in the performance of the work.

The section of the statute relating to notice necessary to bind the surety reads as follows:

"§ 1161. The bond mentioned in section 1159 shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the state of Washington, except in cases of cities and towns, in which cases such municipalities may by general ordinance fix and determine the amount of such bond and to whom such bond shall run: Provided, the same shall not be for a less amount than twenty-five per cent (25%) of the contract price of any such improvement, and may designate that the same shall be payable to such city, and not to the state of Washington, and all such persons mentioned in said section 1159 shall have a right of action in his, her, or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: Provided, that such persons shall not have any right of action on such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, trustees, officer, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

"To (here insert the name of the state, county or municipality or other public body, city, town or district):

"Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or materialman, or person claiming to have furnished labor, materials or provisions for or upon such contract or work) has a claim in the sum of.....

dollars (here insert the amount) against the bond taken from ..... (here insert the name of the principal and surety or sureties upon such bond) for the work of ..... (here insert a brief mention or description of the work concerning which said bond was taken).

"(Here to be signed).....

"Such notice shall be signed by the person or corporation making the claim or giving the notice, and said notice, after being presented and filed, shall be a public record open to inspection by any person, and in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimant shall be entitled to recover in addition to all other costs, attorney's fees in such sum as the court shall adjudge reasonable; provided, however, that no attorney's fees shall be allowed in any suit or action brought or instituted before the expiration of thirty days following the date of filing of the notice hereinbefore mentioned; provided, further, that any city may avail itself of the provisions of this act, notwithstanding any charter provisions in conflict herewith; and provided further, that any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby, and not in conflict herewith." Rem. Code, § 1161.

It will be noticed by comparing the written assignment with the statute that none of the requirements of the statute are thereby complied with. It contains no recital that the bank has a claim against the bond of the present surety, or any surety, either for labor, materials or provisions furnished the contractor, or for money advanced to the contractor used in payment of any such labor, materials or provisions; it does not name either the principal or surety on the bond, nor mention the bond in any way; it is not signed by the corporation making the claim, in this instance the ap-

pellant bank, nor was it filed with the county auditor as a claim against the bond. It seems plain to us that no one reading it would understand it as a claim against a surety bond, or understand it to mean other than what it purports to be—an assignment of warrants then due, or thereafter to become due, from the county to the assignee named therein for the construction of a public road. This is not sufficient. As we said in *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444:

"In view of the language of § 1161, above quoted, that 'such persons shall not have any right of action on such bond for any sum whatever,' unless he 'shall present to and file with such board' the prescribed notice of claim, it seems that argument is hardly necessary to demonstrate that the filing of such notice of claim is an absolute prerequisite to the claimant's right to sue the surety upon the bond. . . . It seems equally plain to us, from the language of the statute above quoted, that the claimant must, as a prerequisite of his right to sue the surety upon the bond, state in his notice, at least in substance, that he 'has a claim . . . against the bond,' designating it by naming the principal and sureties; and that it is not sufficient that he make a statement in his notice of claim that amounts to nothing more than a statement of his claim against the contractor, his original debtor. The sureties upon such bonds have a right to know what claims are being made against them, by timely filing of the required notice. It is not enough that the claimant makes some claim against the contractor, his debtor, or against funds which may be due the contractor. This is the substance of our holding in *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382."

Our conclusion is that the judgment below is without error. It will stand affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14659. Department Two. April 30, 1918.]

OSCAR CARLSON, *Appellant*, v. VASHON NAVIGATION COMPANY *et al.*, *Respondents*.[1]

APPEAL—ORDERS APPEALABLE—DENIAL OF NEW TRIAL. No appeal lies from an order denying a motion for a new trial.

APPEAL — NOTICE — SUFFICIENCY. A notice of appeal from an "order denying a motion for a new trial and all proceedings had in said cause," is insufficient as a notice of appeal from the two final judgments entered, one on dismissing certain defendants and the other entered upon the verdict; in view of Rem. Code, § 1719, requiring the appellant to designate with reasonable certainty from what judgment or orders the appeal is taken.

APPEAL—NOTICE—AMENDMENT. A notice of appeal from an order granting a new trial is not amendable to make it an appeal from the final judgment, within Rem. Code, § 1734, allowing amendment in matters of form, since the defect was not in form but in substance.

Appeal from an order of the superior court for Snohomish county, Alston, J., entered October 13, 1917, denying a new trial, in an action for personal injuries. Dismissed.

Saunders & Nelson and *E. C. Dailey*, for appellant.

Williams & Davis, W. P. Bell, J. A. Coleman, Cooley, Horan & Mulvihill, Hathaway, Beebe & Hathaway, and *J. Y. Kennedy*, for respondents.

MOUNT, J.—Respondents move to dismiss this appeal because the order appealed from is not appealable. The action was brought to recover against seventeen defendants on account of personal injuries. Upon issues made, the case was tried to the court and a jury. After the plaintiff had introduced his evidence, all the defendants moved the court for a directed verdict.

[1]Reported in 172 Pac. 860.

This motion was granted by the court as to all of the defendants except Donald B. McRae, the sheriff of Snohomish county, and the surety upon his official bond. Thereupon, on the 27th day of September, 1917, the court entered a judgment for costs in favor of all the defendants who were dismissed from the case, and the trial proceeded as to the other two defendants. The case was finally submitted to the jury as to the defendant Donald B. McRae and the United States Fidelity and Guaranty Company, the surety upon his official bond, and on the 1st day of October, 1917, the jury returned a verdict in favor of these two defendants. Upon the filing of that verdict on that day, a judgment was entered by the clerk in accordance with the verdict. On October 3, 1917, the plaintiff filed a motion for a new trial. This motion was heard and determined by the trial court on the 13th day of October, 1917. At that time the motion was denied. Thereafter, on the 11th day of January, 1918, the plaintiff served upon the defendants a notice of appeal to this court, which, omitting formal parts, reads as follows:

"You and each of you are hereby notified that the plaintiff Oscar Carlson above named, intends to and does hereby appeal to the Supreme Court of the State of Washington, from the order of the court denying his motion for a new trial herein, which order was made and filed on the 13th day of October, 1917.

"Said plaintiff hereby appeals from said final order and all proceedings had in said cause."

We are satisfied that the motion to dismiss must be granted. The order here appealed from is the order denying a motion for a new trial. This is not appealable. Rem. Code, § 1716.

If the appellant intended to appeal from the final judgment in the case, the notice is clearly not sufficient

under the statute, because, at Rem. Code, § 1719, it is provided that:

"The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from part of any judgment or order, from what particular part."

There were two final judgments in this case: one upon the 27th day of September, 1917, in favor of fifteen of the defendants; and another upon October 1st, as to the remaining defendants. Neither of these judgments is described in the notice of appeal. The only order described is the one which was made and filed on the 13th day of October, 1917. That was the order described in the notice, namely, the order denying the motion for a new trial. The words "Said plaintiff hereby appeals from said final order and all proceedings had in said cause" refer specifically to the order of October 13, 1917, which was the order upon the motion for a new trial. This was not an appealable order. The orders from which appeals might have been taken were not described in the notice. Counsel for the appellant refers us to Rem. Code, § 1734, which provides that the court shall upon terms allow amendments in matters of form, curative of defects in proceedings, to the end that substantial justice shall be secured to the parties, etc. It is plain to be seen that this notice was not defective in form. It is defective in substance, if the appellant intended to appeal from either of the final judgments in the case. Section 1734, Rem. Code, was not intended to do away with notice within time, and it was not intended to cure defects in substance as well as form.

The order attempted to be appealed from not being an appealable order, and the notice not being sufficiently definite as to the orders which, when made,

were subject to be appealed from, the motion must be sustained and the appeal dismissed.

ELLIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13888. Department Two. May 4, 1918.]

WARREN GRIFFITH, *Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

MASTER AND SERVANT — DANGEROUS APPLIANCES — ASSUMPTION OF RISKS—MACHINES IN COMMON USE. A power company using a generator of a type in common use in electrical power plants is not liable because improvements have been made upon generators by which varying loads can be better taken care of without sparking at the commutator; and an experienced employee assumes the risk from the known tendency of the particular generator to dangerously spark while carrying a load.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 10, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee working on an electrical generator. Reversed.

Post, Russell, Carey & Higgins, for appellant.

Burcham & Blair, for respondent.

HOLCOMB, J.—In this action for personal injuries, respondent had verdict and judgment. Respondent was a graduate electrical engineer of several years' experience and had been employed by appellant some eight or nine months immediately prior to the accident, at its power house at and around the generator (a machine used for generating electricity), which he claims was defective and obsolete and of whose de-

[1]Reported in 172 Pac. 822.

fective condition he claims he had no notice. Appellant admits the injury and pleads contributory negligence and assumed risk.

Appellant assigns as error: (1) The court erred in overruling defendant's challenge to the evidence at the close of plaintiff's case; (2) the court erred in overruling defendant's motion for a judgment of dismissal at the close of all the evidence and in submitting the case to the jury; (3) the court erred in overruling defendant's motion for judgment *non obstante veredicto* and in entering judgment on the verdict.

These assignments may be taken up together. The proximate cause of the injury seems to be merely conjectural. The respondent, after describing the machinery and his duties, testified in his direct examination as to the injury on June 14, 1910:

"Q. Now, Mr. Griffith, coming down to June 14, 1910, after you had cleaned out the commutator, state who was there at that time. Did you state? A. Mr. Rawlins. Q. What was done after the machine was cleaned out? A. Well, after it was gone over thoroughly, why then the order was given to the operator to throw it upon the line in order to get the service. You understand there is a certain procedure that has to be gone through with; the floorman has to bring the machine up to the proper speed, so as to get the proper voltage before it can be thrown; that's one of the duties of the floorman, the machine tender. Q. That's what you were doing at that time? A. Yes, that's the shift I was taking at that time. Q. Well, state what occurred then, after the machine started. A. Well, after the machine was started and on to the line and carrying load, I don't know how much load; at that particular instant I noticed that one of these brushes in here on this side, I think it was here (indicating), I would say the third brush arm holder from the top, to your left as you face the commutator, I noticed one of the brushes sparking, so I stepped upon this board very carefully, and with one hand released that little

spring, and with the other hand removed that carbon brush, and scratched the under part of it with the finger, and found a little hard particle on it, and I just scratched it off with my finger nail and placed the brush back in position, and it worked fine, to my satisfaction; then I stepped around to the other side of the generator, and I noticed that this brush on this side, in a similar position, I noticed one of the brushes there, bucking a little bit, and I was going—I stepped upon there and I got my hands just in this position (indicating) and that's all I know, and when I came to, I was down on the floor there, badly burned. Q. Now, what caused you to fall? A. Well, the flash was so great that it dazed me, and made me unconscious; I know that."

There was no direct testimony as to the cause of the accident, but there was a great deal of testimony that this particular generator sparked a good deal of the time and that occasionally there would be a "flash-over." Plaintiff knew that the generator was dangerous while carrying a load, and that it would "flash-over" if a brush should accidentally be dropped on the commutator, and that it would flash when carrying 600 volts on the railway service. He may have disturbed the exciting cause of the flash.

Plaintiff attributes negligence to the use of the type of generator on which he was injured, and showed that improvements have been made upon generators since 1906 by which varying loads can be better taken care of without sparking at the commutator. The generator upon which the injury occurred was of a type still in common use in electrical power plants without the latest improvements.

We held in *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385, that the law is well settled that the master discharges his duty when he provides machinery that is of ordinary character and reasonably safe. He is not required to provide the newest and

best. Employers are not insurers, and the law recognizes that absolute safety is unattainable. They are liable for the results of their negligence, and not for the dangers necessarily connected with the service. The risks incident to the employment are assumed by the person accepting such employment. An employer who uses machinery which is in common and ordinary use in the line of business in which he is engaged cannot be held liable for an accident which might have been prevented by the use of different machinery.

It has also been held in *Le Claire v. Washington Water Power Co.*, 83 Wash. 560, 145 Pac. 584, that an employer complies with his duty to his employee when he exercises reasonable and ordinary care in the selection of instrumentalities destined for his use, when he furnishes him with such as are in common use, without radical defects in themselves, even though it may be shown that there were better appliances for the particular purpose. The machine in question was not shown to have any radical defect in itself.

It is a well settled rule that the servant assumes the risk of apparent danger. This rule will apply with equal force to such dangerous instrumentalities as electrical appliances, especially where the servant is experienced and has worked around such instruments a considerable time.

There being no evidence to sustain the verdict, the cause will be reversed with directions to dismiss.

ELLIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 14362. Department Two. May 4, 1918.]

JOHN T. LANIGAN *et al.*, *Appellants*, v. THOMAS W. MILES, *Respondent*, ETTA LANDIS, *Intervening Plaintiff and Appellant.*[1]

HUSBAND AND WIFE—SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY—PRESUMPTION AS TO PROPERTY ACQUIRED AFTER MARRIAGE. Where a husband negotiated for property, took the deed in his wife's name, directed that the word homestead be indorsed on the margin of the deed, and for twenty-two years thereafter never interfered with his wife's management and control of the property, and no rights of creditors intervened, there was sufficient confirmation of the wife's testimony that it was the intention that she hold it as her separate property apart from the community; such course of conduct confirming the claim of one spouse being sufficient to overcome the presumption that all property acquired after marriage is community property.

TRUSTS—EXPRESS TRUST—CERTAINTY. There is such want of certainty that a court of equity cannot declare a trust in property conveyed by an aged woman by deed absolute to one of her sons, in full confidence that, on her death, such son "would make proper adjustment" of her relations to her other children, "leaving such adjustment solely and exclusively" to such son without any interference by any of the other children.

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 25, 1917, in favor of the defendant, dismissing an action for equitable relief, upon stipulation. Affirmed.

Vanderveer & Cummings, H. McC. Billingsley, and *Welch & Dorr,* for appellants.

Jones & Riddell, for respondent.

Farrell, Kane & Stratton, for intervener and appellant.

CHADWICK, J. — Thomas W. Miles and his wife, Catherine, natives of Ireland, were married in the state

[1]Reported in 172 Pac. 894.

of Pennsylvania. They came to the state of Washington in 1861 and settled near Vancouver. They purchased a farm. The title to the land was taken in the name of Catherine Miles. In 1875, the family, then consisting of the parents and six children, Mary, afterwards Mary Lanigan, the mother of the plaintiffs, Etta, now Etta Landis, the intervener, John, James, Catherine W. and Thomas W., moved to Newcastle, in King county, while the father and two of the boys worked in the coal mines. The mother for a time kept boarders, the older girls working in and about the house. The family moved to Seattle in 1880, where they purchased lot 3, block G, of A. A. Denny's addition to Seattle, for the sum of $1,000. The purchase price was paid in cash. Thomas Miles went to work in the yards of his old employer, the Columbia and Puget Sound Railroad Company. He continued in this service for about twenty years, or until one year before his death, which occurred in 1902. After the fire of 1888, a hotel building was built on lot 2 at a cost of $6,500. To meet this obligation, two mortgages were executed, one for $2,500, in favor of Alonzo F. Hill, the other for $4,000, in favor of one Bersch, a son-in-law, then husband of intervener, Etta Landis. These mortgages were executed by Catherine Miles and Thomas Miles. The obligation represented by the Hill mortgage was later renewed. When renewed, the note and mortgage were signed by Catherine Miles alone. Mr. Bersch operated the hotel, and his mortgage was absorbed by credits for rent. In 1891 or 1892, he and his wife gave up the hotel, which was thereafter conducted by Mrs. Miles.

In 1897, a Mrs. Welsh, a friend of the family, gave Mrs. Miles lot 3, in block 37, A. A. Denny's addition. This property was later improved with a building suitable for a rooming house, with stores on the ground floor. In 1902, at a time when all the children were of

full age, Thomas Miles, the father, died intestate. No petition for the administration of his estate was ever filed. Mrs. Miles continued to operate the two properties until 1907, when she deeded both lots to her son Thomas W. Miles, who has since conducted the business as his own. The deed to Thomas W. Miles is in form a warranty deed without exceptions or limitations. It purports to convey the full title. In 1909, Mary Lanigan, the oldest daughter, brought an action, her sister Etta Landis being joined as plaintiff, against her mother and her brothers, John, James, and Thomas W., and her sister Catherine, to have apportioned and set aside to them a one-twelfth (1-12) interest in the property as an estate of inheritance from their father, Thomas Miles. They set up the intestacy of the father, that no administration of his estate had been had, that there were no debts, and no reason for an administration, and asked that their respective shares be set aside to them. Issues were joined, the defendants denying that the property was other than separate property of Catherine Miles, and affirmatively alleging that Catherine Miles had conveyed the property to her son Thomas W. as the owner, and the plaintiffs had no interest as owners or otherwise therein.

The case never came to trial, but was dismissed upon stipulation of counsel after issue joined. Mrs. Landis now disclaims any interest in the action brought by Mrs. Lanigan, and repudiates the authority of the attorney of record, and while we think the record hardly bears her out in this, our view of the case is such that we may admit that she is right in her contention and that the judgment of dismissal did not operate as an estoppel against her, or as *res adjudicata* of her right to intervene in this case. And we may also admit that the present plaintiffs, although prosecuting the action as the heirs at law of Mary Lanigan, deceased, are not

estopped by the record of the former case to maintain this action to recover their mother's share of the joint estate of Thomas and Catherine Miles.

We are referring to the former action solely for the purpose of introducing the deposition of Catherine Miles, taken while that action was pending and for use at the time of the trial, if her death should occur before the case could be heard. Mrs. Miles there testified that she was the owner of the property, that she had bought it with her own savings, that it had always been understood between her husband and herself that he had no interest in it, and that he did not want any.

The testimony of Mrs. Miles is borne out by the records. The title to the Seattle property was taken in her name, the word "homestead" was indorsed on the margin of the deed, and if, as Mrs. Landis, the intervener, insists, Mr. Miles negotiated the trade and Mrs. Miles had nothing to do with it, it would seem to be clear that the case would fall within the rule of several of our own decisions. It is undisputed that Mrs. Miles, although unable to read or write, transacted all business pertaining to the property, that it was assessed in her name, she paid the taxes, and as the property was improved, she met all taxes and assessments of a special or local character, and discharged the mortgages out of the earnings of the building. There is no testimony which even tends to show that the husband, whose pay never exceeded $75 a month, ever paid or contributed anything to the improvement or upkeep of the property. If he ever kept a bank account or participated in any one business transaction, it is not recalled by any of the witnesses. The only testimony going to the disposition of his earnings is that of Mrs. Miles, who says that he never earned more than enough to support the family.

Counsel rely with seeming confidence upon several of our own decisions holding upon the premise of the presumption that all property acquired after marriage is community property, and that testimony must be clear and the fact apparent that the husband intended to divest himself and the community of all interest in the property and to set it apart to the separate use of the wife before a court will so hold.

Reference to the opinions of this court will show that we have built up two lines of decisions covering the right of one or the other of married persons to assert a separate interest in property. In the one line, the court has had to do with the claims of creditors or the interests of third persons having some tangible equity in or lien upon the property sought to be recovered or levied upon. In the other line, the court has had to deal with husband and wife as free contracting agents, unhampered and unhindered by the claims of creditors or by any one having direct interest in, or lien upon, the property. In all of the first line of cases, the court has had to deal with circumstances which, if unexplained by testimony at once clear and convincing, would amount to badges of fraud. In the second line of cases, it appears that a husband and wife may freely contract, or give one to the other, and thus provide for the holding of property then or thereafter to be acquired as a separate estate.

To make ourselves clear, if the property herein involved had stood in the name of Thomas W. Miles, and he had been the active agent in the care, management, and disposition of it during his lifetime, his widow, or any one claiming under her, would be put to a greater burden than a mere preponderance of the testimony, if it were claimed that the property was her separate property, for the husband's conduct with reference to the property would have been consistent with the

usual practice, and not inconsistent with the ordinary methods of management of community property, funds, or business. But where a course of dealing between spouses, and this running over a period of from thirty to fifty years, is consistent—is not only consistent with, but confirmatory of the claim of the one who asserts a separate estate—we see no reason for saying that the presumption that all property acquired after marriage is community property is not overcome, at least, to the extent of putting a burden on the one who asserts the contrary.

The community property law as originally enacted seems not to have contemplated gifts or contracts between husband and wife with reference to community property, or that community property could ever be given the status of separate property. But by gradual accretion it is now provided that every married person may acquire, hold, enjoy, and dispose of property as if he or she were unmarried. Rem. Code, § 5925. The husband and wife may contract with reference to the status or disposition of property. Rem. Code, § 5919. A *bona fide* purchaser of property from the holder of the record title will be protected (Rem. Code, § 8771); and one spouse may convey directly to the other by deed (Rem. Code, § 8766).

If a husband can convey directly to a wife, it would seem that, if he procures a deed in her name and so conducts himself with reference to the property as to evidence no claim or interest in it, we see no reason why the deed from the stranger should not, as between the spouses, there being no creditor present and objecting, be given the same legal effect as if the property had been deeded to the husband and by him in turn to his wife.

Counsel's main reliance is: *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; *Fielding v.*

Ketler, 86 Wash. 194, 149 Pac. 667. The right of a creditor, a third party, was involved in each of these cases. An understanding on the part of the spouses, or either of them, was not permitted to overcome the presumption afforded by the statute, and it was held that, as against creditors, existing or subsequent, a husband and wife should not be permitted to deal between themselves by any secret understanding, for the statute affords a method by which the property may be placed by the one spouse in the hands of another.

The distinction we have endeavored to make is clearly drawn in *Marsh v. Fisher,* 69 Wash. 570, 125 Pac. 951, where the spouses had entered into an agreement that the husband would operate a threshing machine and receive the proceeds as his separate property, and the wife would run the farm, receiving the proceeds thereof as her separate property. The court maintained the right of a creditor, who had no notice of the agreement, to satisfy an execution out of property claimed by the wife. After noting the rule of *Yake v. Pugh,* 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17, and *Dobbins v. Dexter Horton & Co.,* 62 Wash. 423, 113 Pac. 1088, holding that a husband and wife may agree between themselves as to the character of their earnings and property, the court fixed a limitation of the rule, i. e., that such agreements will not affect the rights of creditors existent at the time of the agreement, or subsequent creditors where the parties continue to live together. Our most recent opinion covering this phase of the law is *Union Sav. & Trust Co. v. Manney,* 101 Wash. 274, 172 Pac. 251.

The plaintiffs and intervener can claim no greater right in the property than Thomas Miles could have claimed in his lifetime. The fact that he negotiated the purchase—accepting the testimony of the intervener as true, and granting for the nonce that the pur-

chase price was paid out of the earnings of the community, a fact denied by Mrs. Miles in her lifetime—and caused his wife's name to be inserted as grantee—an unusual thing—and directed the word "homestead" to be indorsed on the margin of the deed, when coupled with the fact that he never thereafter had aught to do with the property, except to live there with his wife and family, and this over a period of twenty-two years, gives confirmation to Mrs. Miles' testimony that it was the intention of her husband to comply with her desire to have her own home and her own property separate and apart from the community, even to the waiver of his interests.

We may go further and say:

"It is true that, if we look in this evidence for some such specific agreement at some specific time, we may not be able to find it in clear and formal language; but taking her testimony as to the general understanding between herself and husband, in contradiction of which there is not a syllable of evidence, and the fact of the management of her earnings and the property acquired thereby without the slightest control of or interference by her husband, we cannot escape the conclusion that it was at all times since their marriage well understood by both of them that her earnings were to be her separate property." *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088.

See, also, *Ballard v. Slyfield,* 47 Wash. 174, 91 Pac. 642. The status of the property being fixed at the time it was purchased. *In re Deschamps' Estate,* 77 Wash. 514, 137 Pac. 1009; *Guye v. Guye,* 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186.

We hold that the property, lot 3, block G, was the separate property of Catherine Miles, and that the title, as well as the title to lot 3, in block 37, rests in defendant, Thomas W. Miles, unless, as plaintiffs and the intervener contend, the property was deeded in

trust for the benefit of all the heirs. Like the trial judge, we have had some difficulty in following the theory of counsel. They have not committed themselves, but argue generally that the trust is an express trust, or if not an express trust, a constructive trust, or if neither of these, a trust *ex maleficio*. We think, without pursuing the arguments of counsel, that plaintiffs and the intervener must recover, if at all, on the theory of an express trust. It has long since been settled as the law in this state that an express trust must be evidenced in writing. The evidence relied upon to create a trust is found in the answer filed in the suit brought by Mrs. Lanigan, in which the intervener was joined as plaintiff to recover a share of their father's estate. The answer was subscribed by Thomas W. Miles, the grantee in the deed.

After setting up that the property had been bought with the earnings and savings of Catherine Miles, and the agreement between her and her husband that the property was to be her separate property, and that it had ever since been so treated, defendants further alleged:

"The defendant Catherine Miles is an old lady, being more than seventy-five years of age, and on or about the 21st day of June, 1907, deeming that her time on earth was limited, of her own will, and without any influence from any person on earth, went to the office of Richard Saxe Jones, an attorney in the city of Seattle, county of King and state of Washington, and requested him to prepare a deed to her youngest son, Thomas W. Miles, of the entire property known and described as lot three (3) in block 'G' of A. A. Denny's addition to the city of Seattle, which deed was then and there prepared by said Jones, signed and executed by the defendant Catherine Miles, and delivered to Thomas W. Miles, her son, freely and voluntarily, as the express will and desire of said Catherine Miles, and said Catherine Miles then and there expressing to her attorney her full confidence

that upon her death the said Thomas W. Miles would make proper adjustment of her relations as mother to the plaintiffs and defendants in this action, leaving such adjustment solely and exclusively to the said Thomas W. Miles without any interference of any kind by any of the other children of said Catherine Miles."

These allegations were denied in the reply, excepting in so far as it was alleged that Catherine Miles had deeded lot 3 in block G to defendant, Thomas W. Miles.

Granting that a trust may be declared, or rather acknowledged, by a trustee by a subsequent writing, even though informal *(Holmes v. Holmes,* 62 Wash. 572, 118 Pac. 733, Ann. Cas. 1913B 1021, 68 L. R. A. (N. S.) 645), and that a declaration in an answer filed in a suit involving the same subject-matter but for different relief is sufficient to satisfy the statute of frauds, we still think that the declaration relied on is not enough to charge the defendant, Thomas W. Miles, as a trustee. Although bent with years, Mrs. Miles was under no disability of mind; indeed, her testimony, taken in the former action, shows that she was keenly alert to her own interests and mindful of her own intentions. If the answer were no more than an admission that the deed had been made by Catherine Miles in "full confidence that upon her death the said Thomas W. Miles would make proper adjustment of her relations as mother to the plaintiffs and defendants in this action," it might be that the admission would support an offer of oral proof to make the several shares or interests certain, to the end that the true intent and purpose of the trustor should be carried out. In that event, a court could reasonably hold that it was the intention of the donor that each child should take an amount or interest equal to its inheritable interest. But the answer proceeds, "Leaving such adjustment solely and exclusively to the said Thomas W. Miles

without any interference of any kind by any of the other children of Catherine Miles." Keeping in mind that this answer was filed after the deed was made, and that the testimony of Catherine Miles was taken pending a trial, and that she was interrogated by counsel upon the subject of a trust, that there was no offer to amend the complaint or, after the dismissal of the suit, any action brought by either of the then plaintiffs to declare a trust, and that Mrs. Miles lived five and one-half years thereafter, herself making no complaint that her intentions were not being carried out, we think the case falls squarely within the principle announced in *Boyer v. Robison,* 43 Wash. 97, 86 Pac. 385, which is to be read as a part of this opinion. The court there said: "this court is asked to create and declare a trust where the grantor not only failed, but positively declined to do so," which is but another way of saying that an express trust will not be declared as against a deed absolute, unless the intention of the grantor is clear and the interest of the one claiming as *cestui que trust* is made to appear with reasonable certainty. In other words, a court of equity will not declare a trust unless the object of the trust and the extent of interest could be enforced by a decree of the court, not as a matter of equity, but as the certain will of the trustor.

"If there is an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of a trust prior to or at the time of the conveyance by the grantor, and the *cestui que trust* attempts to charge the grantee with a trust in respect to the land, he must produce some writing signed by the grantee of the legal title in order to charge him with the trust. It is only when there is no dispute concerning the existence of a trust, or when the trust arises by operation of law as a resulting or implied trust, that the *cestui que trust* himself can declare its terms." Perry, on Trusts (6th ed.), § 83.

"Wherever therefore the objects of the supposed recommendatory trusts are not certain or definite, wherever the property to which it is to attach is not certain or definite, wherever a clear discretion and choice to act or not to act is given, wherever the prior dispositions of the property import absolute and uncontrollable ownership,—in all such cases courts of equity will not create a trust from words of this character." Story, Equity Jurisprudence (13th ed.), § 1070.

"Nor will a trust be implied if there is uncertainty as to the property to be subjected to the trust, or as to the persons to be benefited by the trust, or as to the manner in which the property is to be applied. Lord Alvanley stated the rule to be 'that a trust would be implied only where the testator points out the objects, the property, and the way in which it shall go.' If the subjects and objects of the supposed trust are left uncertain by a testator, the court will infer that no obligation was intended to be imposed upon the donee, but that the whole disposition was left to his discretion. So if a mere power to appoint is given to the first taker, to be exercised or not at his discretion, no trust will be implied. And no trust will be implied, if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discretion and not an obligation." Perry, Trusts (6th ed.), § 116.

In *Wright v. Atkyns,* 1 Turn. & Russ. 143, 157, Lord Eldon said, that in order to determine whether a trust of this sort is a trust which a court of equity will interfere with, it is matter of observation, first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject.

The words of the answer which are relied on as an acknowledgment of a trust are that Thomas W. Miles "would make proper adjustment" and "leaving such adjustment solely and exclusively to the said Thomas

W. Miles without any interference of any kind by any of the other children of said Catherine Miles." These words are similar to words often employed by grantors and makers of wills, and are as frequently relied on by those who undertake to have a recommendatory trust declared. In *Knight v. Knight,* 3 Beav. 148, 174, Lord Langdale, after subscribing to the formula that a trust would not be declared upon a recommendation unless the words used upon the whole ought to be construed as imperative, that the subjects of the recommendation are certain, and that the objects or persons intended to have the benefit of the recommendation are certain, considered the words "free and unfettered." We take it that words, when relied on as an acknowledgment of a trust, are to be given no greater weight than similar words used in deeds and wills. We also think it will not be denied that the words relied on in this case are the legal equivalent of the words "free and unfettered." Of these words, his Lordship says:

"Any words by which it is expressed or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule."

Finding nothing in the record that would indicate that Mrs. Miles did not have a lively interest in her affairs, we feel warranted in adopting the language of the supreme court of the state of Connecticut in *Gilbert v. Chapin,* 19 Conn. 342:

"We must presume, that the testator well knew the difference between a direction and a request—between

an imperative disposition of his estate and a mere recommendation; and having, as owner of the property, equal power to direct as to recommend, that he meant what he said. We cannot safely interpret written instruments, deliberately and solemnly made, upon any other hypothesis; and when we depart from this, we shall find ourselves employed rather in the making of wills and deeds, than in giving them effect, when made by others."

Finding no error, the decree is affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14375. *En Banc.* May 4, 1918.]

TACOMA MILL COMPANY, *Appellant*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*.[1]

JUDGMENT — RES JUDICATA — MATTERS CONCLUDED. A judgment denying injunctive relief growing out of an alleged violation of a contract, on the ground that mutual mistake had neither been properly pleaded, nor sufficiently proved if pleaded, is *res adjudicata*, and a bar to a subsequent action between the same parties to reform the contract on the ground of mutual mistake; since the merits were, or might have been, litigated in the former action.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered July 7, 1917, in favor of the defendant, dismissing an action to reform a contract, tried to the court. Affirmed.

John D. Fletcher and *Hughes, McMicken, Ramsey & Rupp*, for appellant.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte*, for respondent.

WEBSTER, J.—Appellant brought this action to reform a written contract made between the parties on

[1]Reported in 172 Pac. 812.

January 24, 1906, upon the ground of mutual mistake. From a judgment denying the relief sought, this appeal is prosecuted. The controversy between the parties was before this court on a former appeal, in an action brought by the appellant against the respondent for injunctive relief growing out of an alleged violation of the written agreement above referred to, by the respondent railway company in its threatened use of the right of way granted by appellant to respondent which was the subject-matter of the contract and deed involved in the former litigation. A statement of the facts out of which this litigation arose appears in the former opinion, 89 Wash. 187, 154 Pac. 173.

The complaints in both actions set forth in detail the negotiations between the parties leading up to the execution of the written contract and right of way deed, and the evidence introduced upon the second trial was identical with that presented in the first, with the exception of the additional testimony of E. C. Hughes, which was merely cumulative and would have been pertinent to the issues raised in the former action if appellant's theory of the case had been sustained by the court. The controversy between the parties is with respect to the nature and extent of the right of way granted by appellant to the respondent, the former contending that it was merely a limited and qualified easement for the uses and purposes of the "Bay side extension" of the railway company's line to be used for a freight and industrial track only, while the latter contended that the easement conveyed by the mill company is an absolute and unqualified grant of the right of way for any and all legitimate railway purposes. Appellant, in support of its position in the former case, alleged and sought to prove by oral testimony and correspondence between the parties that the intention was to grant merely the restricted privilege above

stated, while the respondent insisted that the written contract was clear and unambiguous, hence not open to extraneous construction. The court below, as well as this court, on the former appeal, upheld the contention of the respondent and denied the appellant the relief prayed. In the briefs on the former appeal it was insisted by appellant that, "Where a bill in equity states the facts showing what was the real agreement and intention of the parties and asks the enforcement or protection of plaintiff's rights thereunder, coupled with a prayer for general relief, the court will grant the full relief to which the party is entitled, either by reforming the instrument to express the intention of the parties, or by treating it as so reformed." In considering this matter, this court, in the former opinion, said:

"Appellant did not plead any mistake or fraud. There was no fiduciary relation between the parties. They dealt at arm's length. Each party was represented by extremely competent counsel. They proceeded with the utmost care and deliberation. Without reviewing all the cases cited by appellant upon this phase of the case, it will be found that in nearly all of them appears some fact or circumstance tending to show fraud or mistake, aside from the mere reliance upon the representations of the other party to the contract as to its contents."

Thus it will be seen that the court declined to adopt appellant's view for the reason, first, that mutual mistake had not been properly pleaded; and secondly, that the facts established did not warrant the relief sought, even though that issue had been properly tendered by the pleadings. Whatever may be the views of the writer concerning its soundness, this holding became the law of the case and is binding upon both parties and the court on this appeal. It will not be

seriously contended that it was not competent for appellant in the first action to have sought a reformation of the instrument in question on the ground of mutual mistake. In fact, as we have just stated, it was insisted that the facts set forth in the complaint, coupled with a prayer for general relief, in the light of the evidence disclosed by the record, entitled plaintiff to this specific remedy. If the court in the former opinion denied appellant the relief prayed for upon the ground that the evidence did not establish such mutual mistake as will be relieved against in equity, such holding was a decision upon the merits and clearly foreclosed that question. If, upon the other hand, relief was denied because the issue of mutual mistake had not been properly raised by the pleadings, the responsibility for this situation rested upon the appellant. We shall not burden this opinion by the citation of cases showing that this court is committed to the doctrine that an adjudication by a court having jurisdiction of the subject-matter and of the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties could and ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action.

While we are impressed with the equities of appellant's case, we are impelled to the conclusion that the question sought to be litigated in this action is foreclosed by the decision on the former appeal; hence respondent's plea of *res adjudicata* is a complete bar to plaintiff's right to maintain the present suit. This conclusion renders it unnecessary to consider the other questions presented. The judgment is affirmed.

ELLIS, C. J., FULLERTON, HOLCOMB, MOUNT, MAIN, and PARKER, JJ., concur.

[No. 14406. Department Two. May 4, 1918.]

E. L. IRWIN, *Respondent*, v. J. K. LUMBER COMPANY, *Appellant*.[1]

EMINENT DOMAIN — WRONGFUL TAKING — INJUNCTION. Injunction does not lie to restrain a public service corporation from using lands acquired by it for and already put to public use; but the complaining party will be left to his remedy at law.

Appeal from a judgment of the superior court for Skamania county, Darch, J., entered March 15, 1917, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Reversed.

Douglas, Lane & Douglas and *Guy C. H. Corliss*, for appellant.

Miller & Wilkinson, for respondent.

CHADWICK, J.—Respondent is the owner of a license to fish in the waters of the Columbia river at a place abutting the riparian land of the appellant. Appellant is the owner of timber lands lying back from the river, and has acquired lands bordering on the shores of the stream for the purpose of making its terminals, log dumps and booming grounds. It constructed a logging railway from the river into the interior, and has erected its trestles, dumps and booming grounds along the shores and, as respondent contends, over his fishing grounds, to the exclusion of his right to set his nets and maintain his fishery.

It is unnecessary to go into the merit of the case. Appellant is a public service corporation having the right of eminent domain, and having erected its terminal works and having put them to its corporate uses, the courts will not interfere by injunction, but will leave

[1]Reported in 172 Pac. 911.

the complaining party to his remedy at law. The case falls within the rule first insinuated in *Colby v. Spokane,* 12 Wash. 690, 42 Pac. 112, then declared in *Kakeldy v. Columbia & Puget Sound R. Co.,* 37 Wash. 675, 80 Pac. 205, and adhered to in a long line of decisions.

"In the interest of public policy, this court has held that the state or a municipal corporation, or a corporation exercising the privileges of the sovereignty, will not be ousted if it has wrongfully taken possession of the land and is, in fact, devoting it to a public use. The owner will be left to his remedy at law to recover damages. The cases are collected in *Domrese v. Roslyn,* 89 Wash. 106, 154 Pac. 140." *State ex rel. Peel v. Clausen,* 94 Wash. 166, 162 Pac. 1.

The wrong, if any, being only in the manner of taking, equity will afford no remedy. The judgment of the lower court is reversed, with directions to dismiss without prejudice to the right of plaintiff to maintain an action at law.

ELLIS, C. J., MOUNT, MAIN, and HOLCOMB, JJ., concur.

[No. 14469. Department One. May 4, 1918.]

HENRY DIXON *et al.*, *Appellants*, v. PARKER, MORAN & PARKER *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS — CHANGE OF GRADE — POLICE POWER — CONTRACTOR'S BOND — NECESSITY. An ordinance requiring a railroad company to make a separation of street grades is an exercise of the general police power, and the duty of performance placed upon the railroad company is traceable thereto and not to a contractual assumption by the railway company; hence Rem. Code, § 1159 *et seq.*, requiring the city to take a bond from contractors on public work has no application thereto.

RAILROADS — CONSTRUCTION CONTRACTS — BOND — MECHANICS' LIENS — NOTICE — NECESSITY. The failure of a railroad company to take a bond from a contractor, under Rem. Code, § 1129, to respond in lieu of a lien, renders the company liable *in personam*, as provided by the act, for labor and materials furnished to subcontractors; but only when a lien has been duly filed therefor as required by the statute; this liability being only a statutory substitute for the lien *in rem* against specific property, to be perfected by the filing of notice of lien as required by Rem. Code, § 1134, when no bond was given.

FRAUDS, STATUTE OF — DEBT OF ANOTHER — DIRECT PROMISE. A verbal promise by representatives of a railroad contractor and the railroad to see that certain subcontractors were paid, if the main subcontractor did not pay them, is not sufficient to create an original or collateral undertaking and is void under the statute of frauds.

MUNICIPAL CORPORATIONS — RAILROADS — LOSS OF LIEN — EQUITY. Where there was no privity and no lien filed, the fact that a subcontractor's work on a separation of grades was a benefit to the city and the railroad company, would not render either liable in equity, the contractor having been paid in full.

INTEREST — CONTRACT. In an action on contract, interest should be allowed from the date the same was due and not from the date of the judgment.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 6, 1917, upon findings favorable to the plaintiffs, as against one

[1]Reported in 172 Pac. 856.

defendant, in an action on contract, tried to the court. Modified.

R. L. Edmiston, for appellants.

Cannon & Ferris, for respondents.

ELLIS, C. J.—This is an action at law to recover moneys claimed to be due on account of work performed by plaintiffs, Dixon and Oliver, for defendants Parker, Moran & Parker. The facts are as follows: The city of Spokane, in February, 1912, passed an ordinance requiring the Northern Pacific Railway Company to separate the grade of its tracks from that of the streets within a portion of the city by elevating its tracks and changing the grade of certain streets. The ordinance required the railway company to bear all the expense of making the change and do all the work, except the replacing of such sewers and city utilities as were made necessary by changes in street grades. All of the streets from and including Division and Sprague at their intersection and west of it to Seventh avenue were affected by the change. The right of way of the railway company is 400 feet wide, except where reduced to 200 feet under the decision of the supreme court of the United States in *Northern Pac. R. Co. v. Ely,* 197 U. S. 1. To make the grade separation, it was necessary to reestablish the grades of the streets across the right of way and for a considerable distance beyond. The railway company was required to excavate within its right of way, and, in some cases, without its right of way, and to replace the streets at the new level in good condition. The ordinance is very lengthy and explicit as to how the work shall be done, and closes with a requirement that the railway company shall accept in writing the terms of the ordinance within forty-five days after its passage,

failing which the ordinance shall be null and void unless time be extended by the city council. It is conceded that the terms of the ordinance were so accepted by the railway company. Because of certain litigation touching the city's power to require the grade separation *(Holland v. Northern Pac. R. Co.,* 214 Fed. 920), the actual work was not commenced until October, 1914. A contract was then entered into by the railway company with W. J. Hoy, doing business as W. J. Hoy Company, by which Hoy undertook to do the entire work, with certain minor exceptions, as general contractor.

Under this contract the work was to be paid for by the railway company according to schedules made a part of the contract. Hoy sublet different parts of the work to subcontractors; among them, Parker, Moran & Parker, partners, who undertook the work of excavation. This contract was executed on December 18, 1914. Parker, Moran & Parker in turn sublet to the plaintiffs, Dixon and Oliver, by contract dated January 7, 1915, the drilling and blasting, but not the excavation and removal, of the solid rock necessary to be removed from the right of way and streets affected from Washington street east in order to place the streets in their new elevation. From Washington street west the work was done by others. The city, through its engineer, had general charge of the street changes so far as to direct what changes should be made and determine what would constitute a compliance with the ordinance. The city retained the right to construct the sewers either by day labor or contract, but the railway company was required by the ordinance to pay for such work. Proceeding under their contract, plaintiffs undertook the performance of their contract with Parker, Moran & Parker. The railway company filed no bond as required by § 1129 of me-

chanics' lien law. Hoy gave a bond to the railway company conditioned for the faithful performance of his contract and to pay all obligations by him assumed thereunder. It appears that Parker, Moran & Parker agreed to give Hoy a bond but failed to do so. Plaintiffs, Dixon and Oliver, gave a bond to Parker, Moran & Parker, but it does not appear in the record. No bond was filed in the office of the county auditor. Under the contract of Hoy with Parker, Moran & Parker, Hoy was to pay ninety cents per cubic yard for solid rock excavation, of which the drilling and blasting was, of course, a part. Under their contract with Parker, Moran & Parker, plaintiffs were to be paid for the blasting sixty cents per cubic yard. These payments were to be made, the first on estimates received by Hoy from the railway company as to excavation, and the second on estimates received by Parker, Moran & Parker from Hoy on his estimate of the work done.

The first controversy arose between Parker, Moran & Parker and plaintiffs in the latter part of May when the first estimate for the April work was given. Plaintiffs claimed that they were then entitled to $2,000. Parker, Moran & Parker figured plaintiffs' part of the estimate at $806.40, which plaintiffs refused. Plaintiffs appealed to E. J. Cannon, attorney for the railway company. As to what occurred and what agreement was then made, the evidence is in the sharpest conflict. Plaintiffs claim that Cannon then promised that the railway company would see that they were paid the money then and thereafter to become due for their work and directed them to take the matter up with Hoy's office; that they then went to Hoy's office, where Hoy's purchasing agent and superintendent also agreed to see that they were paid and, in effect, guaranteed future payments. Cannon and Hoy's superintendent and purchasing agent all testified that the

only promise made was to endeavor to secure orders from Parker, Moran & Parker for plaintiffs' payments on future estimates so that plaintiffs would receive their pay directly from Hoy and in Hoy's office. Whatever the agreement, it is admitted that, at that time, Hoy paid $1,000, which, with the $806.40 paid by Parker, Moran & Parker, enabled plaintiffs to meet their current pay-roll. Subsequently plaintiffs also received from Hoy in Hoy's office an estimate of $6,800 in June, and a further estimate of $8,000 in July, 1915. These last payments, however, were made on receipts approved by Parker, Moran & Parker, thus corroborating in a measure the claim of Hoy and the railway company as to what the agreement was. Further payments were refused by Hoy on the ground that Parker, Moran & Parker had canceled and countermanded the order.

We find it unnecessary to set out the voluminous pleadings. It will suffice to say that the court sustained a demurrer of the city to the complaint, and the cause was tried to the court without a jury as against the other defendants. The court, upon appropriate findings of fact and conclusions of law, adjudged that plaintiffs recover from Parker, Moran & Parker a balance of $10,559.20, with 6 per cent interest from the date of the judgment, but that plaintiffs take nothing against the defendants city of Spokane, the Northern Pacific Railway Company and the W. J. Hoy Company, as to each of which defendants the action was dismissed without date. Plaintiffs, Dixon and Oliver, appeal.

Appellants contend that the city's demurrer to their complaint was erroneously sustained. It is urged that the city was liable to them under the terms of Rem. Code, § 1160, because it failed to take from the railway company the bond required by §§ 1159 and 1161 for the protection of laborers, mechanics, subcontractors and materialmen. It is argued that the work of eliminat-

ing the grade crossings of the railroad tracks was a public work done on behalf of the city; that the ordinance requiring the separation, when accepted by the railway company, was the exercise of a contractual power, not the police power; that, therefore, the work falls within the purview of the statute making the city liable because of its failure to exact the statutory bond required to be taken from persons doing work for it under contract. If the premises were sound the conclusion would be irresistible. But the premises are not sound. Appellants' minor premise, that the relation between the city and the railway company created by the ordinance was purely contractual, is based mainly upon a decision of the Illinois supreme court which contains some language which supports that contention and much which does not. *Chicago v. Jackson,* 196 Ill. 496, 63 N. E. 1013, 1135. The sole question there involved was as to the right of a property owner, whose property had been damaged by a change of street grade necessitated by a grade separation of a street and railroad, to recover compensation from the city. The court, after intimating somewhat doubtfully that the ordinance was contractual rather than an exercise of the police power, uses language which plainly shows that whether the ordinance was contractual or not was wholly immaterial as between the city and the owner of abutting property. The court said:

"It seems to be thought by counsel for the city that inasmuch as the railroad company has been lawfully compelled to abandon its tracks on the street and so elevate them as to overcome the grade crossing, at great loss and expense to it, without compensation, neither should the plaintiff, who has suffered loss on account of the construction of the same work, be allowed to recover damages therefor. The position, upon first impression, seems plausible, but when care-

fully considered is clearly untenable. The relations of the parties to the city are entirely different. That which called for the exercise of the police power by the municipality was the operation of the railroad in running its trains across the street. Neither the location nor use of the plaintiff's property endangered the public health or safety, and it must be admitted that if the city had attempted to interfere with that property by obstructing his access thereto under any claim of a police regulation, it would have been a flagrant abuse of the police power and no defense whatever to an action for the resulting damages. The plaintiff bears no relation to the railroad company. He had nothing to do with the operation of its road. He makes no claim in his declaration on account of the elevation of the tracks. His cause of action is against the city for so changing the grade of the street as to damage his property."

Whatever may be said of the ordinance there discussed or of that court's views as to the nature of the power involved, our own decisions are controlling here. They distinctly hold that the power to compel grade separation is an incident of the general police power expressly conferred by the constitution and statutes upon cities of the first class. Const., art. 11, §§ 10 and 11; Rem. Code, § 7507, subds. 7, 8 and 9. In *Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 651, 135 Pac. 636, we said:

"The power to be exercised in providing for a separation of grades, as here attempted, is not only attributable to the general police power vested in the city in legislating for the welfare and safety of its citizens in dealing with an admittedly dangerous situation, but is referable to another power—that of providing for changes in the grades of streets and locating railroad and street railway lines thereon, providing for changes of grade in such locations and other like powers as found in subdivisions 7, 8 and 9 of § 7507, Rem. & Bal. Code."

In *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47, we said:

"It is also well established that a city in the exercise of its police power over the streets has authority to change the grade of a street to avoid a dangerous railroad crossing and that such a change is for the benefit of the public and is a public use."

See, also, *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462. In fact, the supreme court of Illinois, in a more recent case than that above cited, has in effect repudiated the dictum relied upon by appellants. Touching a grade separation ordinance, it has said:

"The power of the council to pass such an ordinance is not an open question nor is the source of its authority doubtful. It is from the police power that the council gets its right." *Murphy v. Chicago, R. I. & P. R. Co.*, 247 Ill. 614, 93 N. E. 381.

The mere fact that the railway company was required to, and did, accept the terms of the ordinance and in a sense thus agreed to do in a *certain specified manner* what it could be compelled to do in *some* adequate manner did not change the character of the ordinance from an exercise of the police power into a mere exercise of the contractual function of the city. The acceptance was but an agreement to conform to the police mandate of the city in a specified manner agreeable to both parties—a mere acquiescence in the exercise of the city's police power by the railway company. True, the city in requiring the separation of grades exercised its police power in the public interest. *Spokane v. Thompson, supra.* The public welfare is, indeed, the very basis of the police power. But when the requirement was once made, the duty of performance was that of the railway company. That duty was traceable to the city's command, not to a mere contractual assumption by the railway company. In do-

ing the work it was doing its own work, not that of the city. In fact, the larger part was the modification of its own right of way and roadbed. We are clear that the statute requiring the taking of a bond from the contractor as security for labor, etc., on municipal contracts for public work, Rem. Code, § 1159 *et seq.*, has no application to such a case as this. The demurrer of the city was properly sustained.

It is next contended that the railway company was liable for the labor and material furnished by appellants as subcontractors in the prosecution of the work. It is asserted that the property of an operating railroad company cannot be subjected to liens for labor or material furnished in alteration or repair; that this work was a work of alteration or repair; that, therefore, the railway company was liable because it failed to take the bond required by statute, Rem. Code, § 1129, to respond in lieu of such liens. Again, the premises are unsound and the conclusion correspondingly faulty. The decisions cited by the appellants in this connection go no further than to hold that the lien cannot be enforced by sale of property essential to the operation and maintenance of the road for the public purposes for which it was established. *Buncombe County Com'rs v. Tommey*, 115 U. S. 122; *Connor v. Tennessee Cent. R. Co.*, 109 Fed. 931, 54 L. R. A. 687; *Pittsburg Testing Laboratory v. Milwaukee Electric R. & L. Co.*, 110 Wis. 633, 86 N. W. 592, 84 Am. St. 948. Our statute, however, expressly accords a lien in such cases. Rem. Code, § 1129, after providing for the lien in favor of every person performing labor, etc., in the construction, alteration or repair of any railroad, makes the contractor, subcontractor, architect, builder or person having charge of the work the agent of the owner for the purpose of the establishment of the lien, provides

that the railroad company shall exact a bond from the contractor to respond in lieu of lien, and declares:

"And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

We have held that the bond, when taken and properly filed, dispenses with the agency necessary to create the lien. *Laidlaw v. Portland, Vancouver & Y. R. Co.*, 42 Wash. 292, 84 Pac. 855; *Du Pont De Nemours Powder Co. v. National Surety Co.*, 94 Wash. 461, 162 Pac. 866. It is the agency declared by the statute which creates the privity between the railroad company and the lien claimant which sustains the lien. The failure to take the bond required by the statute creates a statutory liability enforceable *in personam* against the railroad company, but this only when a lien has been filed invoking the statutory agency in manner and time as required by the statute. The filing of the statutory lien notice furnishes the privity between the company and the lien claimant which would not otherwise exist and without which a personal liability, in the absence of the bond, could not be maintained. This liability is but a statutory substitute for the lien *in rem* against the specific railroad property. It seems too plain for argument that, though the filing of the lien is not necessary where the bond is taken dispensing with the statutory agency, if the bond be not taken the liability against the railroad company, whether asserted *in rem* or *in personam*, cannot be maintained without the filing of the lien creating the agency and supplying the privity necessary to the maintenance of the liability. Indeed, the creation of the privity by notice of lien would seem to be more imperative where a personal liability is asserted than in case of a lien *in rem*. In the case before us, appellants were subcontractors of a subcon-

tractor of the principal or general contractor. There was no privity of contract between the railway company and the appellants. That lack of privity was not supplied or overcome in the only way in which it could be supplied or overcome in the absence of the lieu bond; viz., by filing the notice of lien as required by Rem. Code, § 1134. It follows that, unless there was some valid agreement on the part of the railway company to pay, or a guaranty of payment, for appellants' labor, they cannot recover as against the railway company. In the absence of such an agreement the railway company was under no duty to pay appellants or to refuse to pay Hoy any part of the estimates due to Hoy under its contract with Hoy.

But appellants contend that there was a specific agreement on the part of both the railway company and Hoy to pay for the work done by appellants and to guarantee future payments. As to whether there was such an agreement the evidence was voluminous and extremely conflicting. We cannot discuss it in detail within the reasonable limits of an opinion. An attentive examination of the evidence, however, convinces us that there was nothing more than an agreement by the railway company's attorney and assistant engineer in charge of the work for the railway company to advance money with Hoy's consent to meet a specific payroll, which was done, and to charge the amount to Hoy, who, in turn, charged it to Parker, Moran & Parker, and a further promise to arrange for other payments on estimates through Hoy and on orders of Parker, Moran & Parker. The evidence is far from convincing that there was any agreement on the part of the railway company or any one in its behalf to pay future estimates or to guarantee or make future payments except on such estimates and orders. It appears that

this was done through an arrangement with Hoy until Parker, Moran & Parker refused further orders.

It is next contended that the evidence shows that Hoy, in consideration that appellants continue the work, agreed to pay for such work if Parker, Moran & Parker failed to do so. A careful consideration of the evidence touching this question impels us to the conclusion that Dunnigan, Hoy's purchasing agent, and Holman, Hoy's superintendent, promised no more than to get Moran to sign written orders on Hoy from month to month which would justify Hoy in paying to appellants the money coming due on monthly estimates to Parker, Moran & Parker. This, as before stated, it appears was done on the next two estimates; one for $6,800, the other for $8,000, and the receipts for such payments bear the approval of Parker, Moran & Parker. Appellants filed no lien against the railway company which would have justified Hoy or the railway company in making such payments without an order from Parker, Moran & Parker, nor did appellants garnishee Hoy for any amount claimed to be due from him to Parker, Moran & Parker which would have justified Hoy in withholding pay to the latter. Moreover, the alleged promise, even if the evidence justified a finding that it was made just as claimed by appellants, being verbal would have been void under the statute of frauds. Taken in the light most favorable to appellants, the promise claimed was no more than that Hoy and the railway company would see that appellants were paid, which, as this court has frequently held, was not sufficient to create an original or collateral undertaking on the part of the railway company or of Hoy. *Campbell v. Weston Basket & Barrel Co.*, 87 Wash. 73, 151 Pac. 103; *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D 849; *Pressentin v. Hawkeye Timber Co.*, 77

Wash. 388, 137 Pac. 999; *Bresler v. Pendell,* 12 Mich. 224.

Finally, appellants argue that the city, the railway company and Hoy should all be held liable in equity to pay appellants the reasonable value of their work because it contributed to the desired result so that all of these defendants received its benefit. The same argument might be made in every case where a laborer, materialman or subcontractor has lost his right to a lien by failure to file the lien notice as required by law. We know of no principle of equity which would sustain a judgment in such a case merely because the owner of the property had received the benefit, there being no privity, either of contract or in law, between the party sought to be charged and the party claiming the relief. Both Hoy and the railway company have paid to the persons to whom they were bound by contract to pay, all they agreed to pay.

One other matter requires notice. The court found that the amounts due from Parker, Moran & Parker to appellants became due on November 1, 1915, but allowed interest on those amounts only from the date of the judgment. This was apparently an oversight. The judgment should be modified so as to allow interest on the sums found due from November 1, 1915. In other respects, the judgment is affirmed.

WEBSTER, MAIN, PARKER, and FULLERTON, JJ., concur.

[No. 14219. Department One. May 6, 1918.]

NUT HOUSE, *Respondent*, v. PACIFIC OIL MILLS, *Appellant*.[1]

FRAUDS, STATUTE OF—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A memorandum of an order for the sale of goods describing the thing sold, the names of the parties, price and terms of payment, signed by the party charged, meets the requirements of the statute of frauds, though informal and containing abbreviations which it is necessary to explain by oral evidence.

JUDGMENT—BAR—MATTERS CONCLUDED—SET-OFF. Judgment in an action by assignees, in which the defendant pleaded, but could not recover, an offset it had against the assignor over and above the amount of the assigned claim, is not a bar to an action by the former defendants against the assignor for the balance due over and above the offset allowed in the former action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 28, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Halverstadt & Clarke and *Piles & Halverstadt*, for appellant.

Hastings & Stedman and *Ewing D. Colvin*, for respondent.

MAIN, J.—The purpose of this action was to recover the balance due as commissions on account of the sale of a large quantity of peanuts. The trial resulted in a verdict in favor of the plaintiff in the sum of $3,924.11. A motion for judgment notwithstanding the verdict and, in the alternative, for a new trial being interposed and overruled, judgment was entered upon the verdict. From this judgment, the defendant appeals.

The appellant, the Pacific Oil Mills, was a corporation engaged in the importation and wholesale of nuts

[1]Reported in 172 Pac. 841.

in the city of Seattle. The respondent, the Nut House, a corporation, was engaged in the nut business in Seattle, but on a somewhat smaller scale than the appellant. While the respondent was the smaller of the two concerns, it apparently had superior selling facilities or advantages of which the appellant desired to avail itself. Early in January, 1914, the appellant contracted with the respondent that the latter should send a representative to certain eastern cities for the purpose of selling peanuts. For this service respondent was to receive a commission. After this agreement was made, A. L. Delkin, the secretary of the respondent company, visited Chicago and New York, and in each of these cities took orders. One order was for twenty car loads of nuts. The facts concerning these transactions will be found more fully stated in *Carstens v. Nut House,* 96 Wash. 50, 164 Pac. 770.

At the time the commission contract above mentioned was made, the respondent was owing the appellant for nuts which it had purchased from that company the sum of $4,015.89. After the sales had been made in Chicago and New York, a dispute arose between the two companies as to the commissions which the respondent claimed to have earned. The appellant assigned the amount which was owing it by the respondent to Thomas Carstens and Herman Meyer. The assignees thereupon brought suit against the Nut House for the amount of the indebtedness assigned to them. In this action the Nut House pleaded as an offset the commissions which it claimed to have earned by reason of the orders which its representative had taken in Chicago and New York. That case was tried to a jury, and resulted in a verdict sustaining the defense of the Nut House and denying a recovery to the plaintiffs in the action. After the judgment was entered upon the verdict, the plaintiffs appealed and the judgment was

affirmed. The present action was instituted to recover the commissions due over and above the amounts which were offset as a defense in the case in which Carstens and Meyer were plaintiffs and the Nut House the defendant. This case was also tried to a jury, as above stated, and resulted in a verdict and judgment sustaining the right to recover the balance of the commissions claimed to be due. In the present case only two questions appear which were not determined in the former case.

The first question is whether the orders taken in Chicago and New York were sufficient in form and substance to constitute a binding memorandum under the statute of frauds. The statute, of course (Rem. Code, § 5290), among other things, provides that:

"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid, . . . unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The appellant claims that the orders taken—five in number—do not meet the requirements of this statute. While the orders are not formal contracts, the statute does not require that they should be. It is true that the orders, or some of them, are somewhat informal, but each of them contains the essential elements to satisfy the statute. The thing sold is described by words or abbreviations or by reference to sample. The price to be paid is mentioned and the terms of payment, also the party selling and the party purchasing, and each order is signed by the party to be charged. It is true that in one or more of the orders taken there were abbreviations the meaning of which it was necessary to explain upon the trial by oral testimony, but this was not proving an essential term of the contract not cov-

ered by the writing. No authority has been called to our attention which holds that, where it is necessary to explain an abbreviation by oral testimony, the contract necessarily fails to meet the requirements of the statute. We think the orders substantially complied with the requirements of the statute. The substantial effect of a holding that these orders were void would be to require that a contract to satisfy the statute should be a formal one. This would be not only a serious interference with the facility with which ordinary business transactions may be conducted, but would be extending the statute beyond its scope and meaning.

The other question is: Can the respondent maintain this action after having pleaded in the action of Carstens and Meyer against the Nut House the same contracts and the commissions flowing therefrom as an offset? In that action, the plaintiffs being assignees, the defendant was not entitled to an affirmative judgment against them over and above their claim. Had that action been brought by the Pacific Oil Mills, the present appellant, it is doubtless true that the defendant there would have been required to sustain its entire claim or be barred from maintaining another action. The Pacific Oil Mills, by assigning its claim against the Nut House to Carstens and Meyer, put it out of the power of the respondent to get any affirmative relief in that action. The rule supported by the authorities is stated in 34 Cyc. 762 as follows:

"In an action by an assignee a claim against the assignor can be allowed as a set-off, counter-claim, or reconvention, only to the extent of the claim sued upon, and judgment cannot be rendered against the assignee for the excess."

The respondent, having no right in the previous action to recover an affirmative judgment against the

assignees, is not by the law denied the right to maintain a subsequent action against the appellant for the balance due over and above the amount allowed as a set-off.

The judgment will be affirmed.

ELLIS, C. J., WEBSTER, and PARKER, JJ., concur.

[No. 14382. Department Two. May 6, 1918.]

R. W. HILL, *Appellant*, v. ADA M. CALKINS-RICE *et al.*, *Respondents.*[1]

EVIDENCE—PRESUMPTIONS—DUTY OF OFFICERS. It is proper to instruct that the law presumes that the official acts of public officers are properly performed.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 30, 1916, upon the verdict of a jury rendered in favor of the defendants, in an action of replevin. Affirmed.

H. W. Lueders, for appellant.

Max Garretson and *J. W. A. Nichols*, for respondents.

PER CURIAM.—This case has been tried five times before juries in the lower court, and this is its second appearance in this court. It will be found reported in *Hill v. Calkins*, 91 Wash. 634, 158 Pac. 347, to which reference is made for a statement of the facts. The jury in the last trial, in addition to finding a general verdict in favor of respondents, by a special verdict found the property which the appellant is seeking to recover in this action was not the property which appellant's predecessor in interest had conveyed to the

[1]Reported in 172 Pac. 829.

respondent Calkins, but found that the property was the property of Byron L. Aldrich. In view of this special verdict, which was based upon competent testimony, the contentions of the appellant that the tax sale through which the respondents claim title was void by reason of certain irregularities becomes immaterial. The jury having determined that the appellant never was the owner of the property which is the subject-matter of this controversy, it is of no importance as to whether the sale by which the respondents took title was held in strict conformity with the law or not. This disposes of the principal assignment of error urged by the appellant.

Some contention is made that error was committed in allowing a trial by jury and in allowing certain amendments to the pleading. The appellant concedes, however, that these were matters lying within the discretion of the trial court. We find there was no abuse of such discretion.

Objection is also made to the admission of certain testimony. An examination of the record leads us to believe that no prejudice resulted from the rulings in regard to the admission or rejection of testimony.

The giving and refusing of certain instructions is assigned as error; the principal complaint in this regard being that the court instructed the jury to the effect that the law presumes that the official acts of public officers are properly performed. This was a correct statement of the law. *Butler v. Maples,* 9 Wall. (76 U. S. 766); *Hays v. Hill,* 23 Wash. 730, 63 Pac. 576. The instructions, taken as a whole, fully and fairly presented the law of the case to the jury as to those matters which were properly before it.

Error is assigned in the refusal to grant the motions for a judgment notwithstanding the verdict or a new trial. There was ample competent testimony to take

the case to the jury, and there having been no substantial error in the trial, both motions were properly denied.

Upon a careful consideration of the record in this case, we are of the opinion that there was no error of which the appellant is justly entitled to complain.

The judgment of the court below is therefore affirmed.

[No. 14387. Department Two. May 6, 1918.]

LOUIS JONES, *Respondent*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY. Upon an issue as to whether a servant's fall from a car of logs was due to a sudden jerk of the car, or to his stepping and slipping upon a piece of loose bark, the question is for the jury, where the testimony was conflicting and its credibility was for the jury to decide.

EVIDENCE—EXPERT EVIDENCE—SAFE METHOD OF WORK. An expert witness may testify as to whether it was a safe method of unloading logs to use a Marion loader placed upon a track at the side of and parallel with the track upon which the loaded car was placed.

MASTER AND SERVANT—ASSUMPTION OF RISKS—INSTRUCTIONS. Instructions as to a servant's assumption of risks properly state that it must appear that he knew and appreciated the danger, and that an order to do an act involving peril to himself is an assurance of safety and may be obeyed, unless the danger is so obvious and imminent that no person of ordinary care would encounter it.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered April 18, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in loading logs on a car. Affirmed.

[1]Reported in 172 Pac. 810.

Geo. W. Korte and *Cullen, Lee & Matthews,* for appellant.

Robertson & Miller, for respondent.

MOUNT, J.—Action for personal injuries. Plaintiff recovered a judgment on the verdict of a jury in the court below. The defendant has appealed.

The action was brought under the Federal Employers' liability act. The respondent was employed by the appellant as a car repairer. A carload of saw logs was being transported over the line of the appellant railway. This load of logs had spread so that it became too wide to pass through a subway upon the appellant's line. It became necessary to rearrange the load of logs by drawing in the stakes upon the sides of the car. In order to do this it was necessary to unload a part of the logs. For this purpose the load of logs was stationed upon a side track and what is called a Marion loader was stationed alongside of the car to be unloaded. The respondent was upon the carload of logs, and his duty was to fasten tongs to the logs upon the car so that the Marion loader might lift the logs from the car. While engaged in this work, the respondent fell from the car and was injured.

It was maintained by the respondent that the work was done in an unsafe manner by reason of the fact that the Marion loader was placed upon a track at the side of and parallel with the track upon which the loaded car was placed. It was also maintained that the loaded car should have been blocked so that it could not move and that, by reason of the fact that the loaded car was not blocked when unloading the logs, the Marion loader gave the loaded car a sudden jerk which threw the respondent from the car.

The appellant argues that the court erred in denying a motion for a directed verdict at the close of the re-

spondent's case and at the close of all the evidence, and in denying a motion for a judgment notwithstanding the verdict; and in this connection it is urged that the evidence is insufficient to show any negligence on the part of the appellant or its employees, and that the dangers were open and apparent and were, therefore, assumed by the respondent. The appellant also contends that the cause of the respondent's injury was the fact that he negligently stepped upon a piece of loose bark upon the loaded car, and in so doing fell from the car and was injured thereby. Whether the fall of the respondent was caused by his stepping upon this piece of bark or by the sudden jerking of the car upon which he was engaged in his work was, we think, a question for the jury. The jury was instructed that, if the cause of respondent's fall was his stepping upon a loose piece of bark, there could be no recovery. The jury evidently found that this was not the cause of his fall, but that the cause of his fall was the sudden jerking of the car. We have examined the abstract of the evidence and we find testimony therein to the effect that there was a sudden movement of the car, and that this movement of the car caused the respondent's fall. Of course, this evidence was disputed, but the credibility of it was for the jury to decide; and even though the appellant makes a strong argument to the effect that the real cause of the respondent's fall was his stepping upon the piece of bark, we cannot weigh the evidence upon that question. The weight of the evidence and its credibility were questions for the jury to decide. We are satisfied that there was sufficient evidence upon this question to go to the jury. The court, therefore, did not err in refusing to direct a verdict, or to grant a nonsuit, or to enter judgment in favor of the appellant notwithstanding the verdict.

Appellant next contends that the court erred in permitting an expert witness to answer a question to the effect: "Was it a safe or proper method of unloading logs from the car to place the jammer upon a track alongside of the load of logs and fix the hooks from a cable in the logs and unload them in that manner?" Appellant urges that the jury was competent to judge of the safety and reasonableness of the method. In the case of *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208, we held that it was not error to permit expert testimony upon questions of this character.

Appellant next argues that the court erred in giving the following instruction:

"In order to charge a servant with assumption of risk, it is necessary that it be made to appear that the servant knew and appreciated the danger from which such injury resulted. Where a servant is ordered to do an act involving peril to himself, the order contains an assurance of safety, and the servant has a right to obey the order unless the danger is so open, obvious and imminent that no person of ordinary care and prudence would encounter it."

An instruction substantially to this effect was approved in *Anustasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342.

We find no reversible error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

WEBSTER, J., took no part.

[No. 14412. Department Two. May 6, 1918.]

L. H. BROWN, *Appellant*, v. A. C. JAMISON *et al.*, *Respondents.*[1]

TRIAL—ORDER OF PROOF. It is not error to refuse to reopen a case in rebuttal to establish a fact, which, if material, the plaintiff should have presented in his case in chief.

APPEAL—HARMLESS ERROR—INSTRUCTIONS. Upon an issue as to fraud, vitiating a written contract, it is not prejudicial error to instruct that the proof of fraud must be clear, positive and convincing, where the jury could not have been misled by the use of the word "positive."

FRAUD—SETTLEMENT—CONCEALMENT—ISSUES. Where a settlement was made of an option contract prior to defendant's sale of the subject-matter, plaintiff, suing to set aside and entirely evade the settlement, is not entitled to an instruction that it was defendant's duty to notify plaintiff of the sale.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 2, 1917, upon the verdict of a jury rendered in favor of the defendants, in an action on contract, after a trial on the merits. Affirmed.

Cannon & Ferris, for appellant.

Post, Russell, Carey & Higgins and *A. E. Gallagher*, for respondents.

MOUNT, J. — This action was brought to recover $41,389, being one-third of the selling price of certain mines in which the plaintiff claimed to be interested with the defendants. Upon issues joined, the case was tried to the court and a jury, resulting in a verdict for the defendants. The plaintiff has appealed.

It appears that, in June, 1915, the respondent A. C. Jamison requested the appellant to go to Salmo, British Columbia, to secure an option to purchase cer-

[1]Reported in 172 Pac. 853.

tain mining claims known as the H. B. Group. The appellant secured the option as desired by the respondent. Thereupon the respondent gave to the appellant a statement as follows:

"Spokane, Wash., June 24, 1915.

"This is to certify that L. H. Brown is entitled to a one-third interest in the Benson and Ross option contract dated June 24, 1915, on what is known as H B group mines at Salmo, B. C. in consideration of his obtaining said contract for me and in my name and in consideration of said L. H. Brown paying all expenses of obtaining said contract and any necessary changes thereof. (Signed) A. C. Jamison."

Thereafter the appellant was requested to, and did, secure some changes in the option. Respondent attempted to sell these mines, but was unable to do so. After a short time it was necessary to advance money in order to protect the option. Appellant declined to advance any money for that purpose. About this time one R. K. Neill became interested, and the respondent Jamison secured Neill to go to Salmo and get a new option upon the H. B. Group and other mines in the district. Mr. Jamison informed Mr. Brown of this fact. Mr. Brown first objected, but afterwards consented, providing Mr. Neill would sign a letter which was prepared by the appellant as follows:

"Spokane, Wash., July 24th, 1915.

"Mr. A. C. Jamison,

"Spokane, Wash.

"Dear Sir: Beg to acknowledge receipt from you this day of assignment from you to me covering all your rights in the Benson Ross option to you of the date of June 24th respecting the mining property in B. C. known as the H. B. Group, and this letter will act as an acknowledgment that I received the same, together with a like assignment of the Horton Billings interests covered by the 'Smith Curtis' option for the purpose of surrendering the same and receiving from

the owners of said mining properties described in said options a new option or contract respecting the same and the development and purchase thereof. That the new contract or option from both sets of owners shall run to R. K. Neill and A. C. Jamison, both holding an equal interest therein, or in my name and in which case I will execute to you a proper transfer or assignment of a half interest therein to effect the same result.

"It is understood that in all matters pertaining to these mining properties, including the Zincton Group, our interests are to be equal and we are to share equally therein, subject to the interest of L. H. Brown of Spokane, Washington, therein, which shall be assumed by us both in equal shares.

"Yours truly,"

After preparing this letter, the appellant gave it to Mr. Jamison to have Mr. Neill sign it. When this letter was presented to Mr. Neill by Mr. Jamison, Mr. Neill refused to sign it, but did so after making a change so that the last paragraph thereof read as follows:

"It is understood that in all matters pertaining to these mining properties, including the Zincton Group, our interests are to be equal and we are to share equally therein, subject to the one-third interest of L. H. Brown of Spokane, Washington, in the Benson & Ross option, which shall be assumed by us both in equal shares. If R. K. Neill fails to close deal with Ross & Benson of Salmo, B. C., in that event I will return your check for one thousand dollars, including all papers and contracts made between A. C. Jamison, Ross Benson. If deal closed with Billings Horton Rawson, I, R. K. Neill, will divide with A. C. Jamison.

"(Signed) R. K. Neill."

After this letter was signed by Mr. Neill, he went to British Columbia and entered into new option contracts containing claims in addition to those secured by the appellant. The appellant testified that Mr. Jamison did not show him this letter, but stated that Mr. Neill

refused to sign the letter. Mr. Jamison, on the other hand, testified that he took the letter the next day and showed it to Mr. Brown, and that Mr. Brown was dissatisfied with it and proposed a settlement so that he might be released from any interest in the contract. Thereupon Mr. Jamison and Mr. Brown, on the 26th day of July, entered into a contract as follows:

"Spokane, Wash., July 26, 1915.

"Received of A. C. Jamison check for seventy dollars covering expenses in full for two trips to Nelson, B. C., in reference to Benson & Ross option on H. B. mine at Salmo, B. C. An additional attorney fee is to be paid providing new option is obtained either in my name or that of R. K. Neill or any one for us and at the time possession of the property is given, said attorney fee to be whatever A. E. Gallagher considers right and proper, but not, however, to exceed three hundred dollars.

"This cancels all interest in agreement with Jamison for an interest in the previous option made by Benson and Ross or in any profits derived therefrom, and such agreement is hereby cancelled and surrendered. Provided no fee is to be paid if property is not taken over under existing or new option."

Mr. Jamison, at the time this agreement was entered into, paid Mr. Brown the $70 therein mentioned. Mr. Neill proceeded to British Columbia and obtained new options. Afterwards Mr. Neill and Mr. Jamison effected a sale of their interest in the property for $125,000. Mr. Brown was not paid the balance under the agreement of July 26th because Mr. Gallagher, mentioned in the agreement, refused to act as arbitrator. Afterwards, in September, Mr. Brown agreed with Mr. Jamison that, upon the payment of $200, he would be satisfied. At that time Mr. Brown did not know that a sale of the property in the meantime had been made. Mr. Jamison caused the $200 to be paid,

and later this action was brought by Mr. Brown to recover one-third of the selling price of the mines, or one-third of $125,000, less $270 paid. These are in substance the facts.

It was claimed upon the trial that, at the time of the agreement of the appellant to receive for his services the sum of $70 and such other sum not exceeding $300 as Mr. Gallagher should consider right in lieu of his one-third interest in the H. B. Group of mines, the appellant did not know that Mr. Neill had signed the letter of July 24, 1915, above quoted, and because he was not so informed, a fraud was perpetrated by the respondent upon the appellant, and, for that reason, he was not bound by the contract for expenses and the $200 which he had accepted. Upon the trial of the case the appellant was examined with reference to the letter written by him and given to Mr. Jamison to be signed by Mr. Neill. Appellant testified, as we have stated above, that Mr. Jamison told him that Mr. Neill refused to sign that letter. Mr. Jamison testified that he showed Mr. Brown the letter as signed by Mr. Neill and that Mr. Brown was dissatisfied and desired to have Mr. Jamison pay him his expenses and a reasonable fee, which was agreed upon not to exceed $300, and be relieved from any interest in, or further liability on account of, the options. Thereafter, and in rebuttal, the appellant offered to show that the first time he saw that letter it was in the hands of Mr. Gallagher after the settlement had been made. This was objected to on the ground that it was immaterial, and the court sustained the objection. The appellant now argues this was error. If the appellant deemed the fact material as to where and when he first saw the letter, we think it was his duty to go into that upon direct examination when he was presenting his *prima facie*

case. Not having done so, he must have concluded at that time this fact was not material. We think it was clearly not prejudicial error for the court to refuse to reopen the case in rebuttal and again go into the question as to when and where and under what circumstances the appellant claimed to have first seen the letter after it was signed by Mr. Neill.

Appellant next argues that the court erred in giving instruction No. 2 to the jury. This instruction had reference to the fraud alleged, and after stating the rule with reference to vitiating a contract for fraud, the court said:

"I instruct you that in order to avoid the effect and force of the subsequent agreement above referred to, whereby he (appellant) accepted $200 as fees and $70 for expenses in obtaining the Benson and Ross option, the burden is upon him to satisfy you by evidence clear, positive and convincing of all of the following facts: . . ."

The court then proceeded to state the facts upon which the appellant claimed the right to vitiate the contract. It is urged by the appellant that the court erred in using the words "clear, positive and convincing," and it is argued at length that the use of the word "positive" was error because it prevented the jury from considering circumstances in the case. It is not uncommon in instructing juries upon this question for the court to say that such evidence in proof of fraud must be clear and convincing.

In the case of *Quinn v. Parke & Lacy Machinery Co.*, 9 Wash. 136, 37 Pac. 288, this court said:

". . . it is as well settled that nothing short of clear, positive and convincing proof will suffice to establish the fact of such rescission against a party who denies it and seeks to sustain the integrity of the writing."

In *Pronger v. Old National Bank*, 20 Wash. 618, 56 Pac. 391, we approved an instruction which stated:

". . . but you cannot render a verdict against any of the defendants against whom there is not clear and positive proof."

The terms clear, positive and convincing, as used in the instruction, were not intended as descriptive of the kind of proof, but were descriptive of the measure of proof. If we were to hold that the use of the word "positive" was technical error, we are satisfied that the jury could not have been misled by the use of that word in the connection in which it was used in this instruction, and, if error, it would be harmless.

It is next argued that the court erred in refusing to give an instruction as follows:

"The court instructs you that it was the duty of defendant to inform the plaintiff of the fact that a contract for the sale of said properties had been made with Cullen and Bacon on August 27, 1915, and that if you find from the evidence that defendant did not so inform plaintiff, and plaintiff did not know thereof, then plaintiff would not be bound by the settlement wherein he accepted $200, unless you believe from the evidence that if plaintiff had known of said fact he would have made said settlement in any event."

We think the court properly refused to give this instruction, because the contract for the sale of the mines was made more than a month after the agreement between the appellant and the respondent to settle for $70 and not to exceed $300. After that settlement was made, if it was made in good faith as the jury found—and we have no doubt from the record that it was so made—it was clearly not the duty of the respondent to inform the appellant of a sale after that time, unless it was to show that he was entitled to $300, rather than $200. In this action he does not claim that he is en-

titled to $300 provided for in the settlement contract, but is attempting to entirely evade that contract.

We find no reversible error in the record.

The judgment is affirmed.

ELLIS, C. J., HOLCOMB, and WEBSTER, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 14563. Department Two. May 6, 1918.]

B. L. GATES *et al., as Executors etc., Appellants,* v. WILLIS B. HERR, *as Executor etc., Respondent.*[1]

PLEADING—EXHIBITS—DEMAND. A motion for an order requiring defendants to furnish a copy of a written contract pleaded by them, is a sufficient "demand in writing" as required by Rem. Code, § 284, and is "upon notice," within Id., § 1262.

EXECUTORS AND ADMINISTRATORS—CONTRACTS—CONSIDERATION. An executory agreement by an executor to buy from himself, in his trust capacity, a half interest in certain property and apply the proceeds to the payment of a legatee, who had no interest in the property, is not enforcible as a claim against the executor, where the contract was wholly unperformed through the refusal of the court to order the sale, and the property was subsequently sold by the successor of the executor, who never received any interest in it; since there was no benefit to the promisor and no detriment to the promisee.

SAME. An executor's conditional promise to pay a legacy if the court would by its order legalize a sale by himself as executor to himself, is not enforcible as an executor's promise to pay a legacy from an estate possessed of sufficient assets, where the court did not make the order.

CONTRACTS—CONSIDERATION—SEAL. The presumption of consideration for a contract under seal is rebuttable.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 24, 1917, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Affirmed.

[1]Reported in 172 Pac. 912.

T. B. McMartin and *Griffin & Griffin*, for appellants.
Herr, Bayley & Croson, for respondent.

PER CURIAM.—Albert J. Richards died on February 14, 1914, leaving an estate consisting of community and separate property inventoried at $34,946. By the terms of his will a bequest of $6,000 was to be paid to his mother, Philena Richards, out of his separate estate. William Holt, the partner of Richards in the business of conducting the Grand Central hotel in Seattle, was named as executor under the provisions of the will, which was of the character known as a nonintervention will, and letters testamentary were issued to him on February 16, 1914. One month later the executor and the legatee Philena Richards entered into the following agreement:

"Memorandum of Agreement, made and entered into this 16th day of March, 1914, by and between Philena Richards, party of the first part, and William Holt, party of the second part, both of Seattle, Washington.

"Witnesseth: Whereas on the 10th day of February, 1914, Albert J. Richards died at Seattle, Washington, testate, leaving by his will a legacy of six thousand dollars ($6,000) to the party of the first part to be paid out of his separate estate; and

"Whereas a portion of the separate estate of said Albert J. Richards, deceased, consists of an undivided one-half interest in and to what is known as the Grand Central hotel, located in the Latimer building, on the corner of First avenue south and Main street, in the city of Seattle, Washington, said hotel being up to the time of the death of said Albert J. Richards owned and conducted jointly by William Holt, party of the second part, and said Albert J. Richards, deceased, share and share alike; and

"Whereas, said William Holt as the executor and surviving partner of said Albert J. Richards, deceased, desires to wind up the affairs of said partnership and to convert the interest of said Albert J. Richards, de-

ceased, in said hotel into cash for the purpose of raising funds with which to pay said legacy; and

"Whereas the parties hereto have had the said interest appraised by disinterested appraisers who have agreed that the reasonable value of such interest does not exceed the sum of thirty-five hundred dollars ($3,500);

"Now therefore, in consideration of the premises, and of one dollar ($1) in cash paid by the party of the second part to the party of the first part, receipt whereof is hereby acknowledged, the party of the first part agrees that the party of the second part may purchase said one-half interest in said hotel, together with the furniture and fixtures therein contained, as surviving partner, at and for the said sum of thirty-five hundred dollars ($3,500) and the said party of the second part agrees to purchase the same in order to wind up the affairs of said partnership at said price on the following terms, to-wit: The sum of one thousand dollars ($1,000) in cash on or before the first day of April, 1914; the sum of five hundred dollars ($500) on or before the first day of July, 1914; the sum of five hundred dollars ($500) on or before the first day of October, 1914; the sum of five hundred dollars ($500) on or before the first day of January, 1915; the sum of five hundred dollars ($500) on or before the first day of March, 1915; the sum of five hundred dollars ($500) on or before the first day of June, 1915.

"Said deferred payments to be evidenced by the promissory notes of the party of the second part with interest thereon at the rate of 6% per annum, payable at maturity, and said deferred payments will be secured by the party of the second part by a chattel mortgage on said Grand Central hotel and the furniture and fixtures thereof and a mortgage upon lots one (1), two (2), three (3), and four (4) of block two (2) Seaside addition to Alki Point as per the recorded plat thereof. And the party of the first part covenants and agrees to accept from said party of the second part said amount of thirty-five hundred dollars ($3,500) so to be paid as aforesaid as a credit upon and in part payment of said legacy of six thousand dollars ($6,-

000), and agrees and consents that an order of court may be made and entered in this estate permitting and allowing the sale of said half interest in said hotel to the party of the second part at said valuation, which it is agreed is a fair and reasonable one.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written. (Signed) Philena Richards (Seal)

"William Holt. (Seal)

"Witness; A. B. L. Dent.

"The party of the second part agrees to keep all of the said personal property and the building upon the lots herein described insured for not less than twenty-five hundred dollars ($2,500) in a company or companies satisfactory to the party of the first part; loss if any to be paid to the party of the first part as her interest may appear, to be applied to the payment or partial payment of the notes in the order they shall become due in the event of any loss or damage to the property insured or any portion thereof.

"Wm. Holt."

No payments had been made under this contract by the executor at the time of his death on November 17, 1915. After the death of the executor, Minnie Richards, the widow of the testator, was appointed administratrix *de bonis non* of her deceased husband's estate, and thereafter sold her decedent's half interest in the Grand Central hotel under order of the court. Philena Richards died on November 30, 1915, and the appellants B. L. Gates and Alfred R. T. Dent were appointed executors under her last will. They instituted this action against Willis B. Herr, as executor of the estate of William Holt, to enforce payment for their claim of $3,500, with interest, alleged to be due under the foregoing agreement, which claim had been rejected by the executor of Holt's estate. An affirmative defense was interposed, setting up that it was understood between William Holt and Philena Richards that a

one-half interest in the hotel was the separate property of Albert J. Richards, in which his wife had no right, and that the agreement was entered into with a view to securing the consent of Philena Richards to the sale to Holt and a waiver of her right to appear and object to an order of sale, and was for the purpose of raising funds to apply on her legacy; that there was no consideration for the agreement; that, on application for an order of court authorizing the sale of Richard's half interest, his widow objected to the jurisdiction of the court on the ground that the will was nonintervention in character, and further, that she claimed such interest as community property and had notified Holt not to apply any portion on account of the legacy; that, since the death of Holt, Minnie Richards, as administratrix *de bonis non* of the estate of her deceased husband, has sold and disposed of the one-half interest in the hotel and appropriated the money to her own use; and that, owing to the dispute as to the character of the property, such interest was never purchased by Holt. The complaint alleged and the answer denied that the one-half interest of Richards in the hotel property was his separate estate.

The court found that the undivided half interest in dispute had been sold by the administratrix *de bonis non* under order of the court; that such half interest never was the property of Philena Richards, deceased, nor did she ever have the right to possess or dispose of same; that Holt never received any consideration for the agreement with Philena Richards; that he never received the undivided one-half interest in the hotel; that the estate of William Holt, deceased, has never received any benefit or profit by reason of entering into such stipulation; that Philena Richards or her representatives have never been in a position to transfer or convey to William Holt, or his estate, such un-

divided half interest, and that the provisions of the written stipulation between Philena Richards and William Holt have never been complied with. As a conclusion of law, the court found the respondent was entitled to a judgment dismissing the action. From such judgment, this appeal is prosecuted.

The appellants assign as error an order of the court requiring them to furnish respondent with a copy of a written contract which had been pleaded by them according to its legal effect. They contend that there was no "demand in writing" as required by Rem. Code, § 284, that it was not "upon notice" as required by Id., § 1262, and that the motion therefor was not accompanied by any showing of necessity made upon affidavit. The motion itself was sufficient to satisfy the requirement of notice and written demand. The sufficiency of any showing of necessity was a matter within the discretion of the trial court. We think this assignment is without merit.

The issues presented by the pleadings are, was the half interest of the deceased Richards in the Grand Central hotel property community or separate estate, and, if the latter, did the surviving partner, who was also executor without the intervention of the court, enter into a valid agreement binding upon himself whereby title to such half interest passed from Richards' estate to himself, thus rendering him personally liable to Philena Richards.

The court did not expressly find that Richards' one-half interest in the hotel was either separate or community property, although appellants requested a finding that it was separate property. In view of the conclusion we have reached upon the merits of the case, the failure of the court to find as to the separate character of the property was immaterial.

The claim in behalf of the estate of Philena Richards against the estate of William Holt is founded on the written agreement wherein Holt, as an individual, undertakes to buy from himself, as an executor of Albert J. Richards' estate, the one-half interest of such estate in the Grand Central Hotel property and apply the agreed price upon the legacy to Philena Richards. This half interest had never been distributed to Philena Richards. The will of Albert J. Richards bequeathed to Philena Richards "the sum of six thousand dollars ($6,000) in cash . . . to be paid out of my separate estate." The bequest did not give Philena Richards title to any specific property of the estate. It merely gave her a contingent right to the sum of $6,000, or whatever less sum should develop as pertaining to the decedent's separate property on final distribution of the estate. In making the agreement with Holt, Philena Richards parted with nothing of value. The half interest in the hotel was inventoried as separate property in which she would have some interest under the will, but her agreement to accept from the executor its agreed valuation to be applied on her bequest would not constitute a valuable consideration. Her agreement to consent to an order of court for the contemplated disposition of this property was nothing more than a waiver of any right to object. The only party really bound to do anything under the contract was William Holt, thus constituting it a pseudo-unilateral one. But in a sense he was not bound. The agreement called for the sanction of an order of court, and this was never obtained. The evidence does not show there was any attempt of the parties to proceed with the agreement after the refusal of the court to order the sale. There is no evidence that Holt ever attempted to assert title to his deceased partner's interest, and it

must be presumed that the arrangement between the parties was abandoned.

This action is maintained on the theory that the agreement constituted a valid indebtedness on the part of Holt enforcible as a claim against his estate. The most favorable view possible is that the agreement was an executory contract remaining unperformed. No attempt was ever made to enforce the performance of the agreement against either Holt or the executors of his estate. The record shows merely a claim based upon Holt's contract to buy from himself in his trust capacity as executor and apply the proceeds of the sale upon a bequest owing by his trust estate, if the court would sanction it. We are satisfied that the appellants have no valid claim against the respondent. The record further shows that the hotel half interest which was covered by the agreement upon which appellants found their claim was subsequently sold by Holt's successor in administering Richards' estate, by order of the court under due process. Whether the property thus disposed of was separate property of Richards subject to the bequest in favor of his mother is not a matter for determination here. Nor does there seem to be any question of the rights and liabilities of a surviving partner in the case, inasmuch as the surviving partner, who was also the executor, made no attempt to administer the partnership portion of the estate in any other capacity than that provided by the statutes governing the administration of decedents' estates.

The appellants contend that their right of recovery is supported by the rule which makes an executor personally liable for the debts and legacies of the testator, where the estate possessed assets sufficient and the executor promised payment to the creditor or legatee. If that rule were recognized as going to the

extent of binding the executor personally on a promise to pay a legacy instead of a debt, we have no such promise in this case. The promise was merely conditional that if the court would, by its order, legalize the sale by himself as executor to himself as an individual, he would pay the purchase price out of his own funds as a *pro tanto* application on the legacy. Although the generally accepted rule is that an executor cannot purchase at his own sale, it may be conceded that the present case might afford an exception to the rule, since the transaction would have been for the best interests of the estate in disposing of a partnership interest at what the evidence shows was an advantageous price, inasmuch as this interest on a subsequent sale realized $2,000 less than this offer. But we are confronted with the fact that the property in no sense belonged to Philena Richards. Her interest in the estate was for a cash legacy contingent on the realization of that sum from the assets constituting the separate estate of the decedent. Her right to such legacy is still intact. Holt's agreement in his dual capacity to buy and pay for the one-half interest in the hotel would not form a contract with Philena Richards. His promise to pay her therefor, if viewed from the standpoint of contractual relations, was void, since it was not hers to dispose of. While the acquisition of the whole interest in the hotel might have been a benefit to him, there was no element of detriment to her. She was entitled to payment of the legacy and it was the executor's duty to discharge the bequest. The only element of consideration affecting her was the benefit in expediting part payment of a legacy due her. One of the rules relating to consideration is stated in 9 Cyc. 316, as follows:

"There is no consideration for a promise where no benefit is conferred upon the promisor nor detriment

suffered by the promisee, and the promisor neither undertakes to do anything which he is not bound to do nor forbears to do anything which he has a right to do. . . . The detriment to the promisee which suffices as a consideration for a contract must be a detriment on entering into the contract, not from the breach of it."

It is plain the agreement shows a *nudum pactum* so far as Philena Richards is concerned. Council contend, however, that because the agreement was under seal it imported a consideration. That is only *prima facie* so, and the rule in such cases is that want of consideration may be shown as a matter of defense. *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. 96.

Finding no prejudicial error in the case, the judgment is affirmed.

[No. 14579. Department Two. May 6, 1918.]

FRANK W. FLOOD, *Respondent*, v. RALPH EDUARD VON MARCARD *et al.*, *Appellants*.[1]

CONTRACTS—BY TELEPHONE—EVIDENCE. A contract for an extension of time to complete a sale is not shown by a telephone conversation in which an offer to extend the time was made, and no response whatever was made by the other party.

VENDOR AND PURCHASER—TITLE—MERCHANTABLE TITLE. A good and marketable title is not shown where a title insurance company, upon the advice of its general counsel, whose learning and skill is not questioned, refused to insure the title because of a question of descent, it being an open question whether the law of Germany or of this state controlled.

Appeal from a judgment of the superior court for King county, French, J., entered May 16, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

[1]Reported in 172 Pac. 884.

Charles Bedford and *C. E. Stevens,* for appellants.
Eugene R. West, for respondent.

CHADWICK, J.—Respondent brought this action to recover the sum of $500, earnest money paid upon the purchase price of certain lands. The land was sold under an offer made by respondent as evidenced by a receipt signed by the agent of the appellants. The receipt is in part as follows:

"(1) If the owners of said land accept the offer of $10,000, the balance of the purchase price, $9,500, shall be paid within sixty days after written notice is given said Frank W. Flood and abstract of title delivered to him. Conveyance to be by good and sufficient deed free and clear of incumbrance and the owners to pay the taxes for the year 1915.

"(2) If the owners decline or fail to accept said offer within ninety days from the date hereof, the amount paid, $500 will be returned to the Title Trust Company.

"(3) Should said Frank W. Flood fail to pay the balance of the purchase price, $9,500, within sixty days after being notified in writing of the acceptance of his offer, then the $500 hereby acknowledged shall be considered earnest money and forfeited to the owners.

"G. H. Plummer."

The owners accepted the offer upon the terms mentioned in the receipt, and on the 27th day of March, 1916, tendered an abstract of title. Respondent's attorney noted certain liens and incumbrances, and further questioned the title upon grounds growing out of the descent of the property. Mr. Plummer and his attorneys confessed the liens and incumbrances, and after clearing the record of them, resubmitted the abstract. They refused to correct other objections, taking the position that the abstract showed a good title and that respondent was bound to accept it under his contract. Respondent and his attorney were equally

as insistent that the title was not good and that the abstract failed to show a good or marketable title.

There were some negotiations between the parties and between the attorneys. It seems reasonably clear that, between May 18 and May 22, 1916, there were several conversations and several letters passed between the interested parties, Mr. Plummer saying that, although he and his attorney insisted that the title was good, they would, as an act of courtesy, procure certain quitclaim deeds from the heirs of Kreigk, all of whom lived in Germany, but that all the expenses to be incurred should be borne by respondent, and that it was then understood and agreed that such deeds should be procured and that the time for the payment of the balance of the purchase price should be extended for sixty days. Respondent admits having conversation with Mr. Plummer, but denies that such an agreement was entered into, and asserts that he rescinded the sale at that time and demanded the repayment of his earnest money. On June 8th the parties, after some correspondence, met again. Mr. Plummer insists that it was then understood that the deeds were forthcoming, but on account of the uncertainty and delay in the mails, they had not yet arrived.

Appellant, on the other hand, testified that he again demanded the repayment of his earnest money, but agreed with Mr. Plummer that he would take the title as it stood and pay $2,000 down and $2,000 a year for four years, at seven per cent interest, provided the title was guaranteed by a title insurance company. He says that Mr. Plummer objected to this, assigning as his reasons for so doing that he had already gotten an acceptance of the other offers and that it would cause considerable delay and expense and would require time. Respondent again demanded his money.

The fact remains, however, that the title was submitted to a title insurance company at Seattle. Insurance was refused. One of the attorneys for appellants took the matter up personally with the insurance company. Failing to convince it of its error, the matter was referred to the general counsel for the company, who rendered an opinion that the title was not insurable to the extent, at least, of a one-sixth interest. Respondent saw the attorney for appellants on July 19. Respondent met Mr. Plummer on the same day:

"A. Well, I called first at Mr. Stevens' office and I told him that, having finally received the general counsel of the Washington Title Insurance Company's refusal to insure that title, that I presumed he would be now ready to return my money, and asked him if he hadn't changed his mind and he said, 'Not a bit;' whereupon I said, 'I am going down and see if I can see Mr. Plummer. I will see if he has not changed his towards returning my money;' expected fully that after the Washington Title Insurance Company—after they had acceded to my belief, then that they would certainly return that $500. Couldn't see upon what grounds they could refuse. Q. You went to see Mr. Plummer? What conversation did you have with Mr. Plummer? A. Well, Mr. Plummer, he still refused to return it on the ground that the title was good. Ignored it. . . . Q. When was the next conversation you had with Mr. Stevens or with Mr. Plummer in regard to this matter? A. After July 19th. Well, I had no conversations whatever after that with either of them regarding this land. Q. With either one of them? A. No, sir. . . . A. Well, I would like to tell you one more thing regarding my conversation with Mr. Plummer. I had forgotten it. I don't remember, but Mr. Plummer, he said—I said, 'Mr. Plummer, regarding this matter of this eighty acres, I have considered your contract rescinded ever since I first notified you. That is a dead letter, except for me to bring suit for my money, unless you return it to me.' "

Each party undertook to fortify his position by a writing. On July 20, respondent wrote Mr. Plummer as follows:

"Dear Sir: I agreed to accept the title offered me on west ½ S. E. ¼ sec. 25-24-4 E. provided the Washington Title Insurance Co. would insure the same, and it has been finally and firmly rejected after a thorough examination by the company's expert title lawyers, and finally going to its general counsel, so I went over to see you yesterday, trusting I would be able to end the matter by getting the return of my earnest money. I was unsuccessful in this, and must notify you now that unless this money, with interest from the date of deposit, is sent me at once, I shall have suit instituted.

"Will you kindly let me have a reply by next mail?

"Yours truly,

"Frank W. Flood."

Mr. Plummer replied:

"Dear Sir: I am in receipt of your letter 20th instant. As previously explained to you, I take the position that we have offered you good title to the W½ of SE¼ sec. 25-24-4E, and stand ready to convey the land by good and sufficient deed, free and clear of encumbrance, as provided in the receipt for $500 paid on account of purchase price thereof, dated February 4, 1916.

"To comply with the request of your attorney and upon his assurance to me that you would complete the purchase upon securing a deed from Adolph Eduard von Marcard, I wrote the Deutsche Bank, Berlin, May 31st enclosing for signature of Adolph Eduard von Marcard a form of quitclaim deed to the property, and I expect to receive same in course of time, though as you know, the mails between the United States and Germany are interfered with and delayed.

"I desire to repeat that I do not consider that the quitclaim deed from Mr. von Marcard is necessary to perfect title; I take the position that the title which we have submitted to you is good, and therefore must decline to return the earnest money paid, $500.

"The agreement of February 4, 1916, called for the payment of the balance of purchase price within sixty

days after you were notified in writing of the acceptance of the offer and delivery of abstract of title, which notice of acceptance was given March 20th and abstract was delivered March 27th. Upon your attorney's assurance that you would close the purchase immediately upon the delivery of the quitclaim deed from Mr. von Marcard, I extended the time for payment of the balance of purchase price sixty days, which extended time will expire July 27th, but as I am leaving next Sunday for a trip to Alaska and do not expect to return until August 10th, I will, as suggested in our conversation of 19th instant, grant further extension to August 15th, unless the quitclaim deed is received in the meantime, in which event I will expect you to close the transaction promptly. I am leaving the matter in the hands of Mr. C. E. Stevens during my absence, with authority to complete same.

"Yours truly,
"G. H. Plummer."

Respondent's attorney denies that he ever agreed to waive other objections and accept the title if supported by a quitclaim deed from Adolph Eduard von Marcard. Mr. Plummer testified to his understanding as follows:

"A. Mr. West called me on the telephone from his office in Seattle, and stated that in fact the title was not satisfactory to them, to his client, and he demanded a return of the earnest money. I told Mr. West that we did not take his view of the title; that we considered it marketable, but that I would make an effort to secure the three deeds that he claimed were necessary to perfect the title; one from Dr. Fester, another from Adolph von Marcard, and a third from Mr. Schlossmacher. . . . however, if there was any expense attached to it I would expect them to stand that expense. . . . I told Mr. West also that, inasmuch as the option expired about that time—I have forgotten the exact date, probably the 26th or 27th—that we would not take snap judgment on them and declare the money forfeited, but that I would extend the time, and I then extended the time sixty days, extended the option sixty days, thinking that we might be able to get the deeds

within that time. Q. What did he say to that, as to whether it was satisfactory or not? A. Mr. West did not express any disapproval of that. I don't recall that he expressed any disapproval of that course at all, and as a matter of fact, assuming that that course was satisfactory to Mr. Flood and his attorney, two or three days later than that I sent to Germany for the deed."

But we think this is not sufficiently definite to make a contract, granting, but without deciding, that an attorney would have a right to contract for his client for an extension of time upon an option contract for the purchase of land.

This action was begun in September, 1916. Late in December, 1916, Mr. Plummer received the deeds from Germany and notified respondent that he was ready, able and willing to deliver them to respondent.

Appellants have maintained throughout that (a) the title was good, and (b) that respondent was granted an extension of time, and that the deeds were delivered within a reasonable time.

We hold that the testimony is not sufficient to warrant a holding that there was an extension of time granted to respondent, or if it were to be so held, the extension by agreement expired sixty days after June 8, and any other extension was immaterial and not binding on the respondent. He was not bound to accept an extension, and his letter of July 20 negatives an acceptance of a further grant. So that the question of procuring the deeds from Germany within a reasonable time is not a question which can in any sense be held to control respondent's rights.

On the other proposition we are convinced that the title was not free from reasonable doubt under the rule announced in *Moore v. Elliott*, 76 Wash. 520, 136 Pac. 849. That it was not such a title as a buyer would take when exercising ordinary prudence in the conduct of

his affairs is sufficiently evidenced by the refusal of the title insurance company to guarantee it, and the refusal of its general counsel, whose learning and skill in the law cannot be questioned, to approve the title. Neither of these had any interest in the main transaction, and we can conceive of no higher evidence of a want of marketability of title, as that term has been construed by this court, than these opinions.

Few titles are good to a mathematical certainty, nor does the law demand that they shall be so, but the value of a title on a resale is an element to be considered.

"A purchaser is entitled to a merchantable title, a marketable title—such a one as will bring in the market as high a price with, as without the objection." *Parmly v. Head,* 33 Ill. App. 134.

While the law will not countenance the idle scruples of one interested in withholding the purchase money *(Brown v. Witter,* 10 Ohio 143), it will not compel one who seems to be acting in good faith to accept a title if there be reasonable probability of a lawsuit to convince a purchaser on resale, or to quiet the title. *Moore v. Elliott, supra.*

In the case at bar, the objection seems to have been founded in reason. There was a question of descent to be decided by applying the law of Germany or the law of this state. Which law would govern was an open question, and that the objections of respondent were not made idly for the purpose of withholding the purchase price is sufficiently evidenced by his offer made as late as June 8, 1916, to take the title and pay the full price if a company engaged in the business would guarantee it.

We find no error.

Affirmed.

ELLIS, C. J., HOLCOMB, PARKER, and MOUNT, JJ., concur.

[No. 14595. Department One. May 6, 1918.]

In the Matter of the Estate of J. J. FERGUSON. HIRAM C. GILL, *Executor, Appellant,* v. JAMES F. MCFARLAND, *Respondent.*[1]

EXECUTORS AND ADMINISTRATORS—ORDER TO SELL REAL ESTATE—CONSTRUCTION. An order in probate, directing the executor to "immediately mortgage or sell" a portion of the estate, contemplates that he take the necessary steps provided by statute for that purpose.

Appeal from an order of the superior court for King county, Ronald, J., entered August 21, 1917, directing the sale or mortgaging of property of an estate to pay fees of the executor, after a hearing upon a show cause order. Affirmed.

Heber B. Hoyt and *Herman S. Frye,* for appellant.

E. H. Guie and *Ballinger, Battle, Hulbert & Shorts,* for respondent.

MAIN, J.—This is an appeal by the executor of the estate of J. J. Ferguson, deceased, from an order of the superior court directing him to mortgage or sell so much of the estate as might be necessary to raise the sum of $11,363.43. J. J. Ferguson died on the 19th day of September, 1914, leaving a will in which, as the executor thereof, he named Hiram C. Gill, who thereafter became the qualified and acting executor of such last will and testament. On the 27th day of April, 1915, the executor assigned in writing to one James F. McFarland all his commissions then due or thereafter to become due or owing to him as executor. This assignment provided that the commissions, when collected and paid to McFarland, should be credited upon certain notes which the executor individually was owing to McFarland. During the course of the administra-

[1]Reported in 172 Pac. 813.

tion of the estate, an order was entered fixing the fees of the executor at the sum of $11,363.43. On December 20, 1916, the executor filed his final account and petitioned the court for an order of distribution, and the order of distribution was entered on February 1, 1917. On August 9, 1917, McFarland petitioned the probate court for an order directed to the executor requiring him to show cause why he should not take steps as by law required to either mortgage or sell such portion of the estate as might be necessary to realize a sum sufficient to pay the commissions, in order that the same might be applied upon a judgment in favor of the petitioner which had been rendered in a mortgage foreclosure action. The notes above mentioned were secured by the mortgage. On the same day an order was entered directing the executor to show cause why he should not mortgage or sell a portion of the estate for the purpose of realizing the above mentioned sum. This show cause order was answered by the executor, and the cause in due time was heard by the court. After the hearing, an order was entered directing the executor to sell or mortgage so much of the estate as might be necessary to realize an amount sufficient to pay any balance due him as executor's fees. From this order, the executor appeals.

No statement of facts or bill of exceptions has been brought to this court. The trial judge made no findings as to the facts. Upon this state of the record the only question that the court can consider is that raised relative to the construction of the order entered. The appellant claims that the order is a summary direction to him to sell and mortgage, and does not contemplate that he shall take the necessary steps defined in the statute when property of an estate is to be mortgaged or sold. The respondent claims that the intent and purpose of the order was that the executor should

mortgage or sell in the manner provided by law. While the order is that the executor be

"directed and required to immediately either mortgage or sell such portion of said estate as is necessary to realize an amount sufficient to pay any balance payable to him as such executor upon said executor's fees allowed as aforesaid . . ."

we think it plain that it was not contemplated by the order that the executor should sell or mortgage the property of the estate without taking the necessary steps provided by statute for that purpose. There being nothing in the order which would indicate that the property was to be mortgaged or sold in any other manner than that provided by statute, it seems plain that the order should be given such construction as would harmonize with the statute, rather than one which would not be in harmony therewith.

Affirmed.

ELLIS, C. J., WEBSTER, PARKER, and FULLERTON, JJ., concur.

[No. 14608. Department Two. May 6, 1918.]

NEBRASKA INVESTMENT COMPANY, *Respondent*, v. JAMES E. CORLETT *et al.*, *Appellants*.[1]

COMPROMISE AND SETTLEMENT—ITEMS INCLUDED. Where an item included in a suit had been dismissed as a subject of controversy therein, without prejudice to an independent action, and the suit went to final judgment on other items and appeals were taken, a compromise of the appeals and judgment did not include the item dismissed from the suit.

JUDGMENT—BAR—MATTERS INCLUDED. A judgment on consent, vacating the judgments appealed from and all appeals taken, pursuant to a settlement, and not mentioning an item dismissed without prejudice, is not a bar to a subsequent action thereon; nor would the holder be barred by failure to appeal, since it could accept the ruling allowing independent action.

SAME — BAR — PARTIES CONCLUDED. Such consent judgment on settlement of the suit is not binding upon the defendant as to the item dismissed out of the case without prejudice, where such item was dismissed because it was the personal obligation of the manager of the company, who was not a party to the suit and had no interest in the judgment compromised.

BILLS AND NOTES—ACTION ON DUE BILL—DEFENSES. In an action on a due bill given as the personal obligation of the manager of a company, the fact that the company had been given credit on its books for the amount is no defense to the action against the manager.

Appeal from a judgment of the superior court for King county, Brawley, J., entered June 8, 1917, upon findings in favor of the plaintiff, in an action on a due bill, tried to the court. Affirmed.

Peters & Powell, for appellants.

Donworth & Todd, for respondent.

CHADWICK, J.—This is an action on a due bill:

"Dec. 17, 1910.

"Due Nebraska Investment Company, the sum of Three thousand dollars. James E. Corlett."

[1]Reported in 172 Pac. 851.

The defense is payment through the settlement of a suit between the Nebraska Investment Company and the Moresby Island Lumber Company, Limited, in British Columbia.

Appellant James E. Corlett was the principal stockholder and managing director of the Moresby Island Lumber Company, Limited, a British Columbia corporation. This corporation had timber holdings in British Columbia which respondent and its associates desired to purchase. On October 5, 1910, they took an option, paying then $26,000, and during the following six months they made payments aggregating $41,500. One of the sums making up this amount was the $3,000 which respondent is seeking to recover in this action.

Appellant Corlett, as managing director of the lumber company, conducted all the negotiations and received payments on its behalf. W. I. Coleman, the secretary and treasurer of respondent, acted for it and its associates and made all the payments. Pending the negotiations between respondent and the Moresby Island Lumber Company, Limited, Corlett asked for a personal loan of $3,000. Coleman declined to make the loan to Corlett, but was willing to advance the money as a payment on the option. He drew a check payable to Corlett. Just then Coleman was called from his private office, and when he returned Corlett had gone with the check and in lieu thereof had left a due bill drawn with his own hand, as above quoted. When Coleman returned he read the due bill and telephoned Corlett that the amount of the check would have to be treated as an advance on the timber contract, a payment to the Moresby Island Lumber Company, Limited. Corlett advised him that that would be all right. Corlett testified on the trial of this case that he had carried it in his account as part of the money furnished

by respondent to the Moresby Island Lumber Company.

Respondent and its associates failed to exercise their option and the Moresby Island Lumber Company, Limited, claimed a forfeiture. The respondent and one Phelps, who had an interest in the transaction, sued the lumber company in the supreme court of British Columbia for $41,500, the amount of the several payments made by Coleman to Corlett, including the $3,000 evidenced by the due bill. Upon a garnishment auxiliary to its suit, $41,500 was paid into the registry of the court to await a determination of the suit. Corlett was not made a party.

At the trial the plaintiffs contended that the $3,000 was paid on the option, and the lumber company contended that it was a personal loan to Corlett. Corlett so testified at the trial. The trial judge held that the option money was forfeited and gave judgment in favor of the lumber company.

On an appeal to the court of appeals of British Columbia, the judgment was reversed except as to the item of $3,000. The appellate court held that, as it was doubtful whether the $3,000 was paid on the option or loaned to Corlett personally, and as the burden of proof was on the plaintiff, the $3,000 should be eliminated and judgment entered for $38,500, the ruling of the court being in part as follows:

"The item of $3,000 stands on a different footing to that of the other items. I confess some doubt as to how this item should be treated. The witness Coleman, for the plaintiffs, said that it was paid to Corlett, the defendant's manager, for the same purposes as were the other sums. It is very clear that Corlett applied to Coleman for this sum for his own personal use, and told Coleman so. That sum was paid to Corlett, who gave a personal due bill for it, but if Coleman did not intend to accept it as such, he should have had the

matter put right at once. I think it best to resolve what doubt I have in favour of the defendant, the onus of proof being upon the plaintiffs, and leave the plaintiffs, if they be so advised, to pursue their remedy against Corlett."

From this judgment the lumber company appealed to the King in Council, or, as more generally spoken, The Privy Council at London. Neither party appealed from the order of the court eliminating the issue as to the $3,000. While the appeal was pending, a settlement was agreed upon, and what is called a "consent order" was entered in the supreme court of British Columbia on December 4, 1914. By the terms of the consent order it was decreed the action was settled without costs to either party

"and that all judgments entered herein be vacated. And this court doth further order that the moneys now standing in court to the credit of this action, together with all accrued interest thereon shall be paid out to the firm of Bodwell & Lawson and W. J. Taylor jointly, who shall pay one-half of the said money to Eberts & Taylor as the solicitors for the plaintiffs and one-half thereof to the solicitors for the defendant; and each of the parties hereto consenting and undertaking thereto, this court doth further order that the said parties shall by their respective solicitors dismiss and vacate, without costs to either party, any appeals that have been taken from the judgment of this court, whether to the Court of Appeal or to His Majesty in Council, and that all matters in difference between the parties hereto and at issue in this action or in the said appeals shall be deemed to have been determined by the settlement to be carried out under this order."

The appeal to the Privy Council was dismissed.

Although presented in various ways, the determinative points in the case are whether the item now sued on was included in the settlement; or, if not, whether

respondent is concluded by the settlement as it is evidenced by the order of the court which we have just quoted.

That the amount now demanded was not settled by the parties or carried into the claim of the respondent against the lumber company, we are quite convinced. The Nebraska Investment Company had included it as an item in its suit against the lumber company. It denied its liability and offered appellant as a witness to sustain its contention. He testified that it was his personal obligation and that his company was in no way bound. The court held that the lumber company was not liable and dismissed the item as a subject of controversy, leaving to the plaintiffs, "if they are so advised, to pursue their remedy against Corlett," which ruling under our practice would be called a dismissal without prejudice of the cause of action in so far as it was based upon the $3,000 item.

As we have said, both parties to the action accepted the ruling of the court. The appeal was directed to the judgment of $38,500, and the items going to make up this amount would have been the only items which the Privy Council would have considered. The judgment, in so far as it eliminated the item of $3,000, in the absence of a cross-appeal, was final and conclusive upon the parties. Nor is respondent to be barred of a recovery because it did not appeal. It might have applied for a cross-appeal, but the allowance of an appeal under the English law is a matter of grace and not of right, and furthermore, it was content, as is evidenced by the bringing of this action, to accept the ruling of the court and bring its suit against appellant, who is said to have been, and is now presumably, solvent. Nor was there any reason why appellant should pursue the lumber company with respect to this item, when at the trial counsel for respondent under-

took to inquire into it, counsel for the lumber company interrupted the proceedings, saying:

"But there was one item of $3,000 that was not company money, the rest of it was company money. . . . Mr. Corlett is ready to pay that amount. . . . That is one of the adjustments that had to be made. You need not bother about that, you can have that at any time you ask for it—that $3,000, you don't need to prove anything about it."

Appellant was present and made no remonstrance.

While the appeal was pending and negotiations for a settlement were on, appellant prepared a memorandum of the items going into the settlement for submission to respondent. In contradiction of his former attitude he included the item of $3,000 as a payment made by the lumber company. The manager of respondent, to whom the proposed stipulation was submitted, refused to consider it because it included the item of $3,000, and the whole matter was referred to their solicitors, who fixed up a stipulation to meet the settlement. Of course, appellant insists that the $3,000 was an item in the settlement, and some circumstances arising in subsequent conduct give slight color to his contention, but these are explained and can be given no probative force when measured by the record of the entire transaction.

Nor do we think that respondent is concluded by the terms of the order entered upon the stipulation. At the time it was entered, appellant was in no sense a party to the action. The item of $3,000 had been held to be his obligation and had been dismissed out of the case. There was no identity of interest. He had no personal concern in the judgment against his company, nor had it any interest in the item which is the subject of controversy. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186. Appellant knew that the respondent had

refused to consider the item of $3,000 as a subject of further negotiation or settlement and, if as he now contends, it was to be included, it would have been the part of prudence on his part to have had it specifically mentioned.

It is further contended that respondent should not be permitted to recover because appellant testified that the lumber company had since been given credit for the $3,000. But respondent has no concern with the mutual dealings of appellant and his company. Appellant is the managing director and it was within his power to keep his books and the books of his company in his own way. He said in testifying: "The three thousand dollars was paid to me for my own use, for my individual business. . . . It was deposited to my own account and it was used by me." What account was charged, or why the company should be credited for a $3,000 item personal to the manager, is not for respondent to inquire into, for surely it is not to be denied a recovery if appellant has dealt with a third party to his disadvantage.

Affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14237. Department Two. May 7, 1918.]

J. M. MOHNEY, *Appellant*, v. WALTER DAVIS *et al.*, *Respondents.*[1]

PARTIES—SUBSTITUTION—STATUTES. The probate code, Laws 1917, p. 674, § 116, providing for the substitution of parties in actions pending against a decedent at the time of his death, applies to actions pending in the superior court, and does not repeal Rem. Code, § 1743, relating to substitutions in the supreme court upon the death of party after final judgment in the superior court.

APPEAL—PARTIES—DEATH PENDING APPEAL—SUBSTITUTION — TIME —STATUTES. Rem. Code, § 1743, providing for substitution on appeal in case of the death of a party after final judgment "as in case of the death of a party pending an action in the superior court," refers to the act of 1917, p. 674, § 116, providing that such substitution be made within 90 days after the first publication of notice to creditors, which provision is mandatory.

Applications filed in the supreme court February 4, 1918, for orders to substitute representatives of deceased parties on appeal. Granted as to respondent James M. Davis; denied as to respondent Edith M. Rigg.

Voorhees & Canfield and *C. E. H. Maloy*, for appellant.

Hanna & Hanna and *M. F. Gose*, for respondent James M. Davis.

Wakefield & Witherspoon and *M. F. Gose*, for respondent Edith M. Rigg.

HOLCOMB, J.—This cause is before us on applications to substitute representatives of deceased parties, on appeal.

Plaintiff brought this action for fraud and conspiracy upon eleven causes of action, ten of which were assigned to him. He recovered judgment against Beck

[1]Reported in 171 Pac. 919.

and Davis upon seven causes of action. Plaintiff appealed from the judgment dismissing the first, fourth, ninth and tenth causes of action, and defendants Beck and Davis appealed on September 27, 1916, from the judgment against them, and thereafter, on April 18, 1917, gave a supersedeas bond which stayed the collection of the judgment against them until the disposition of the appeal. On May 18, 1917, defendant and cross-appellant Beck died. Edith M. Rigg was appointed executrix of his estate, and notice to creditors was given July 5, 1917. On October 22, 1917, defendant and cross-appellant Davis died. James M. Davis was appointed executor of his estate, and notice to creditors was published December 14, 1917. Motions for substitution of parties were made and served by plaintiff on the 28th and 29th of January, 1918. The executrix and executor resist this motion on the ground that the cause of action has abated and that the motion is untimely under § 116, p. 674, ch. 156, Laws of 1917, which is:

"If any action be pending against the testator or intestate at the time of his death, the plaintiff shall within ninety days after first publication of notice to creditors, serve on the executor or administrator a motion to have such executor or administrator, as such, substituted as defendant in such action, and, upon the hearing of such motion, such executor or administrator shall be so substituted, unless, at or prior to such hearing, the claim of plaintiff, together with costs, be allowed by the executor or administrator and the court. After the substitution of such executor or administrator, the court shall proceed to hear and determine the action as in other civil cases."

We will concede the effect of this statute if this action were pending in the superior court. It does not attempt to legislate on the subject of appeals, nor does the probate code explicitly repeal Rem. Code, § 1743.

The power of this court to substitute parties in appealed cases must be gathered from this statute. Rem. Code, § 1743, is:

"The death of a party after the rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal, but the proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or *may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court,* and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof."

The probate procedure of these two deceased parties would come under Laws of 1917, ch. 156, p. 642. It is plain that the clause in § 1743, *supra,* "as in case of death of a party pending an action in the superior court," refers us to the law in force at the time for substituting parties in case of death in the superior court. Laws of 1917, ch. 156, p. 674, § 116, as above quoted, provide that, within ninety days after first publication of notice to creditors, plaintiff shall serve a motion on such executor or administrator to have a substitution of defendant made. This statute is mandatory. It will therefore be seen that the motion for substitution of Edith M. Rigg, executrix, for George C. Beck, defendant, is untimely and must be denied, the motion having been made more than ninety days from the date of first publication of notice to creditors.

The motion for substituting James M. Davis, executor, for the defendant Walter Davis, having been

made within ninety days from the date of the first publication to creditors, will be granted, and it is ordered that James M. Davis, executor, be substituted as defendant in place of Walter Davis, deceased.

ELLIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 14262. Department Two. May 7, 1918.]

A. L. HOTCHKIN, *Administrator etc., Appellant,* v. McNAUGHT-COLLINS IMPROVEMENT COMPANY *et al., Respondents.*[1]

LIMITATION OF ACTIONS — STATUTES — APPLICATION TO EQUITY. Under Rem. Code, § 153, abolishing all distinctions between actions at law and equity by providing a single form of action, and Id., § 155, providing that actions can only be commenced within the periods prescribed after the cause accrues, and Id., §§ 156, 157, 159, and 165, providing limitations for actions for the recovery of real estate, on contract, in writing and not in writing, and for fraud, and for relief not thereinbefore provided for, the statute of limitations will be applied by courts of equity as it would be applied at law, except as between the trustee and *cestui que trust* of a direct, express, continuing trust in the exclusive jurisdiction of a court of equity, in which case the statute does not run as long as the trust subsists.

TRUSTS—EXPRESS TRUSTS—ACTIONS—LIEN—LIMITATIONS. Where the trustees of an express continuing trust asserted adverse claims for more than two years and made the same known to the *cestui que trust* who then elected her remedy and litigated her claims to final judgment without asserting the proper equitable remedy to enforce the trust, an action therefor is barred by the statute of limitations.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 5, 1916, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

[1]Reported in 172 Pac. 864.

James M. Epler, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondent McNaught-Collins Improvement Company.

Peters & Powell, for respondent Trimble.

Holcomb, J.—In this case appellant, in his brief, makes a comprehensive statement that the action is brought by him as administrator of the estate of his deceased wife, in whose lifetime the action, substantially as here presented, was before this court three times; and in the case as now presented the appellant has, in his complaint, attempted to avoid the errors upon which the decisions were rendered against the appellant in the several cases referred to, *Collins v. Kinnear,* 37 Wash. 453, 79 Pac. 995; *Hotchkin v. Bussell,* 46 Wash. 7, 89 Pac. 183, and *Hotchkin v. McNaught-Collins Imp. Co.,* 67 Wash. 206, 121 Pac. 455. For the sake of brevity, a quality increasingly to be desired in judicial opinions, those cases are referred to for the history and issues involved in the former cases as well as in this. As will be seen by reference to the former cases, the litigation has been pending in various forms since as early as 1903. On July 27, 1903, Mrs. Hotchkin, then living, filed her petition or motion to vacate the judgment in the first case, wherein judgment was rendered in favor of McNaught-Collins Improvement Company in the superior court on appeal from the board of state land commissioners. The motion was denied. Appeal was taken to this court and decided in *Collins v. Kinnear,* 37 Wash. 453, 79 Pac. 995, dismissing the appeal because of failure to properly prosecute it. As shown in the present complaint, she then, on about May 4, 1905, filed a complaint again praying the superior court to vacate and annul the decree entered in the previous matter, which complaint being dismissed, she again appealed to this court. That

case is decided and reported in *Hotchkin v. Bussell,* 46 Wash. 7, 89 Pac. 183. In that case, as in this, she alleged that the decree taken in the original proceeding was taken without notice to her and was in violation of a contract with Collins, and that respondents had notice, actual and constructive, of her preference right to purchase the lands in question. Upon the decision of that case, Mrs. Hotchkin commenced another action against these respondents and one Trimble which, being decided against her, was appealed to this court and is reported in *Hotchkin v. McNaught-Collins Imp. Co.,* 67 Wash. 206, 121 Pac. 455, and after the decision by this court, the court below dismissed the action as to all the other defendants in the case.

These former cases are mentioned and referred to in the complaint in the present case, and for the purpose of avoiding recurrence of certain deficiencies pointed out in the complaint before the court in 67 Wash. 206, 121 Pac. 455, the present complaint contains an allegation that the former decree was rendered by agreement of all parties to the proceeding who or which were in court, and was rendered, as plaintiff is informed, simply upon such agreement and without the rights of the several parties being shown by testimony, and that defendant Trimble and the heirs of Collins, acting for themselves and for Mrs. Hotchkin, deceased, joined in the agreement for and in consideration of the money paid to them by the McNaught-Collins Improvement Company for the preference right to purchase the tide lands claimed by Collins and Mrs. Hotchkin. A further allegation is included in this complaint that the motion upon which the decision of the supreme court sustaining the decision of the superior court in dismissing the case as to Trimble only, on the ground that the complaint did not show that Trimble shared in the proceeds of the sale of Mrs. Hotchkin's prefer-

ence right to purchase, in no way affected the other defendants, and that the order dismissing that action as to the other defendants was without any proper reason and decided nothing. In the case reported in 67 Wash. 206, 121 Pac. 455, and in this case, the prayer of the complaint is that defendants, and each of them, be adjudged to pay the plaintiff such sum of money as the testimony upon the hearing of the action may show Mrs. Hotchkin's interest in said lands to be worth, and for such other and further relief as to equity may belong. In that case it was decided that, notwithstanding the prayer of the complaint, the action as to Trimble was strictly a law action for money relief only. It was then vigorously contended that the action was an equity action and should be considered upon that basis. It is now vigorously contended that this action is purely of equitable cognizance for the enforcement of a trust against the respondents, as to which the statute of limitations does not apply, and also as to which it is claimed there was no adjudication in any of the former cases.

One of the grounds of demurrer in the instant case, upon which the court sustained the demurrer and dismissed the action, is that the action is barred by the statute of limitations. Appellant insists that it is a general and well defined principle of law that, when the demand is purely an equitable one—in other words, is one cognizable only in a court of equity—the statute of limitations does not apply, and in such cases courts do not recognize, and are not controlled by, the period of limitations fixed by statute; citing *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *German v. Heath*, 139 Iowa 52, 116 N. W. 1051, and many other authorities to the effect that equity applies its own limitation.

In this state, by Rem. Code, § 153, it is provided that, "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and redress of private wrongs, which shall be called a civil action." Thus, as in the code states generally, all distinctions between actions at law and actions in equity are abolished.

It is the policy of the law in this state, as manifested by numerous legislative enactments, that periods shall be established when any claim or demand for the enforcement of any kind of rights shall be deemed too stale for enforcement. These statutes of limitation are not regarded with disfavor, being considered statutes of repose. By Rem. Code, § 155, it is provided that, "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute." This section is general and applies to any form of civil action, legal or equitable. Section 156, Rem. Code, provides that actions for the recovery of real property, or for the recovery of possession thereof, shall be commenced within ten years from the accrual of the cause of action. Section 157, Rem. Code, provides that actions upon any judgment or decree of any court of the United States, or of any state or territory, and actions upon a contract in writing, or liability, express or implied, arising out of a written agreement, shall be commenced within six years from the accrual of the cause of action. Section 159, Rem. Code, provides that actions upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument, and actions for relief upon the ground of fraud, which shall be deemed to have accrued upon the discovery by the aggrieved party of the facts constituting the fraud, shall be commenced within

three years after the accrual of the cause of action. Section 165, Rem. Code, provides that actions for relief not thereinbefore provided for shall be commenced within two years after the cause of action shall have accrued. These and other statutory provisions limiting the period within which actions shall be prosecuted are manifestly intended to cover any and every form of action maintainable, either in law or equity.

The applicability of statutes of limitation to equitable proceedings appears to be unquestioned in those jurisdictions in which distinctions between legal and equitable remedies have been abolished. 17 R. C. L. 736; *Patterson v. Hewitt,* 195 U. S. 309; *Munson v. Hallowell,* 26 Tex. 475, 84 Am. Dec. 582.

Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this is rather in obedience to the statute than by analogy. Hence, if the statute would bar an action at law, it will be equally a bar in equity, the mode of relief making no difference. Courts of equity apply the statute as it would have been applied at law, and give to the statute the same effect and operation in one court as in the other. The periods prescribed by the statute are recognized in such cases as imposing a limitation on the cause of action itself, and not merely on the court in which it may be prosecuted. 17 R. C. L. 736, 737.

In the above authority an exception is stated where the relationship between the parties is that of trustee and *cestui que trust.* The statute of limitations will not necessarily apply although the remedies at law and in equity are concurrent. See, also, 25 Cyc. 1056, 1058. This exception is upon the principle that, in the case of a technical, or, in other words, direct, express, continuing trust, such as is exclusively within the juris-

diction of a court of equity, the general rule is that the statute of limitations does not run between trustee and *cestui que trust* as long as the trust subsists, for the possession of the trustee is the possession of the *cestui que trust,* and the trustee holds according to his title. In order to set the statute in motion in favor of the trustee, the trust must terminate, as by its own limitations or by settlement of the parties, or there must be a repudiation of the trust by the trustee and an assertion of an adverse claim by him, and the fact made known to the *cestui que trust.* 25 Cyc. 1150. This exception also is subject to the qualification that the *cestui que trust* may be barred of his remedy through laches or such a lapse of time as will give rise to a presumption of discharge or extinguishment of the trust. 25 Cyc. 1151.

In the present case, as shown by the history of the litigation between these parties, running through the reports covering the same heretofore, there can be no doubt that the exception with regard to an express continuing trust cannot apply in favor of appellant for the reason that it has been established that those whom Mrs. Hotchkin claimed to be her trustees of an express, continuing trust asserted their adverse claims as long ago as 1903, and the fact was made known to the *cestui que trust,* who thereupon began to assert her claims against them. She chose and elected her remedy at that time and litigated her claims to decisive and final judgments. If she did not assert the proper equitable remedy to enforce a trust it was her fault and her laches. Under any consideration of the case, assuming it to be one of purely equitable nature, under our statute and conceding the exception noted by the authorities cited, the action is barred by limitations as well as by laches.

This conclusion determining the case, the other questions are unnecessary to mention. The judgment is affirmed.

ELLIS, C. J., and MOUNT, J., concur.

[No. 14383. Department Two. May 7, 1918.]

W. L. TYNER, *Respondent*, v. S. S. STULTS *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER — RESCISSION — CONDITION PRECEDENT — TENDER. An action for rescission will not fail because of failure of the plaintiff to tender a repayment, where the complaint alleged such tender and the status quo was preserved; since a court of equity may impose equitable terms as a condition of relief.

MORTGAGES — REMEDIES OF ASSIGNEE — RESCISSION — FRAUD. The sale of a note and mortgage may be rescinded by the purchaser for fraud where he asked for and received assurance that the security was ample, relying on false representations inducing the sale.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 20, 1916, in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

Corbin & Easton, for appellants.

Cooley, Horan & Mulvihill, for respondent.

CHADWICK, J.—This action was brought by respondent to rescind a contract for the exchange of certain properties.

After some preliminary negotiations, appellants agreed to trade a house and lot then owned by them in the city of Everett and valued at $2,200, the consideration being $625, to be paid in cash and real estate, upon which there was then due $215, and a first mortgage upon forty acres of land for $1,340. Respondent sought

[1]Reported in 172 Pac. 850.

the trade in answer to an advertisement which reads as follows:

"A gilt-edge $1,300 first mortgage to trade for residence property in Everett. See Ward S. Bowman, 412 Colby."

One payment of interest was made upon the mortgage. A payment of $340, and interest amounting to $53.60, became due on June 20, 1916. This was not forthcoming. Respondent went over to Island county, where the land covered by the mortgage was situate and the mortgagor resided. He demanded payment. The mortgagor being unable to pay, the respondent looked over the security for the first time. He found the land to be denuded of timber. The land is worth, accordingly as we read the testimony, approximately $1,000, but there is no market for such land. This action was brought very soon thereafter. No demand was made upon appellants for a rescission, and no tender of repayment or offer to reassign the securities was made, although it is alleged in the complaint that these things were done. Respondent bases his right to rescind upon the alleged misrepresentation of the appellants and their agent as to the character of the land covered by the mortgage.

It is not contended that any inquiry was made as to the financial responsibility of the makers of the mortgage. It is insisted by respondent and his wife, who was a witness, that the agent of appellants, as well as appellant S. S. Stults, represented that the land was covered with merchantable timber which was not to be removed until the mortgage was paid; that respondent told the parties that he was busy painting a house and would be unable to go and see the security; and that, having faith in their representations and in them, they knowing of his inability to determine the value of the

security for himself at that time, he made the trade which he now seeks to rescind.

At the trial, respondent, through his counsel, was invited to say that he was now in position to convey back all the property he had received from appellants; and also that he could convey back all that he had received, "if the court should grant a decree of rescission."

We are satisfied that respondent bought the mortgage believing that the land was covered with merchantable timber, and that it was of sufficient value to make the security "gilt-edged," which means, no doubt, convertible or payable on demand. But appellants have contended from the beginning, and now contend, that no action can be maintained without proof of a previous tender, and that the decree of the court that a rescission be had, if respondent shall within ten days put appellants *in statu quo,* does not meet the demands of the law. The position of counsel is sustained by ample authority, but we have heretofore followed after those cases which hold that it is within the power of the court to protect all the rights of the parties by its decree, and that a previous tender, or offer to rescind, is not necessary under a state of facts such as we have before us. We said in *Snarski v. Washington State Colonization Co.*, 53 Wash. 221, 101 Pac. 839, quoting from 24 Am. & Eng. Ency. Law (2d ed.), p. 621:

"Whether the complaint in a suit for rescission must, as a condition precedent to relief, have offered or tendered restitution to the defendant prior to the bringing of the suit, is a matter upon which the authorities are conflicting. The rule of the better considered cases is, that it is sufficient that the plaintiff make his offer to restore or to do equity, in his bill or complaint, and shows therein that he has substantially preserved the *status quo* on his part so as to be able to fulfill his offer.

This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith."

See, also, *Colpe v. Lindblom,* 57 Wash. 106, 106 Pac. 634; *Angel v. Columbia Canal Co.,* 69 Wash. 550, 125 Pac. 766; *Robbins v. Wyman, Partridge & Co.,* 75 Wash. 617, 135 Pac. 656; *Odell v. Burnham,* 61 Wis. 562, 21 N. W. 635; *Owen v. Jones,* 68 Ore. 311, 136 Pac. 332; *Gamblin v. Dickson,* 18 Idaho 734, 112 Pac. 213; *Knappen v. Freeman,* 47 Minn. 491, 50 N. W. 533.

It is the contention of the appellants, however, that the rule of *caveat emptor* applies, and many of our decisions are cited. Respondent, on the other hand, cites quite as many cases to sustain his contention that courts will grant rescission where an owner of land has been deprived of it through the fraudulent misrepresentations of the vendee. We think none of the cases cited is strictly in point for either side.

Appellants did not sell, and respondent did not buy, a 40-acre tract of land, the condition and value of which he might have looked up before the trade was consummated. The thing bought was the note of a third party and a mortgage theretofore made to secure it. The demand of the law that one who buys shall take reasonable precaution to defend himself is satisfied when respondent asked for and received assurance that the security was ample so as to make the note good for the balance of the purchase price of the house and lot. We are not prepared to say that the facts found by the trial judge are not sustained by a preponderance of the evidence, and therefore affirm the judgment. Remanded with instructions to take an accounting of ac-

crued rents and taxes and to enter a decree accordingly.

ELLIS, C. J., MOUNT, MAIN, and HOLCOMB, JJ., concur.

[No. 14392. Department Two. May 7, 1918.]

EAST ABERDEEN LAND COMPANY, *Appellant*, v. GRAYS HARBOR COUNTY, *Respondent*.[1]

TAXATION—VALUATION—EXCESSIVE ASSESSMENT. An assessment of tide lands, upon a zone system having reference to the value of the central unit, at $10,855, is excessive and not equal or uniform with other like property, where it appears that the tract consisted of 2.73 acres and had no practical value apart from the uplands, which were worth not to exceed, and could be bought for, $40 to $50 per acre, and other water front property was assessed at from $10 to $250 per acre.

Appeal from a judgment of the superior court for Grays Harbor county, Back, J., entered February 24, 1917, in favor of the defendant, in an action to secure a reduction of taxes, tried to the court. Reversed.

Morgan & Brewer, for appellant.

W. H. Tucker and *J. E. Stewart*, for respondent.

CHADWICK, J.—This is an action brought by the appellant to compel the county of Grays Harbor to accept a tender of taxes upon certain tide lands bordering the shores of the Chehalis river.

The Chehalis river empties into Grays Harbor and for several miles from its mouth is navigable for ocean going vessels. The cities of Hoquiam, Aberdeen and Cosmopolis are located on the river. The tide lands affected by this suit are located across the river from the city of Cosmopolis, and from thence down the stream to a point at about the east boundary of the city

[1]Reported in 172 Pac. 876.

of Aberdeen. The uplands abutting the shore are unimproved logged-off land of the character known as tide land swamp. They have a potential value for factory and mill sites and are assessed at from $50 to $100 per acre.

Harbor areas were established in the Chehalis river in 1892. The inner harbor line was so established with reference to the meander line that several strips or threads of land were left between the inner line and the meander line. These the state has claimed as tide lands. It afterwards caused them to be surveyed in six tracts. They were offered for sale in September, 1912, at public auction, and were bought by appellant, the owner of the upland, for the sum of $735.69. Each strip varies in width, from a feather edge to one hundred feet at a point in one of the strips. The tracts are numbered and have a total area of 2.73 acres. They were assessed in 1913 and 1914 as shown below. The basis of actual valuation for 1914 is shown:

Tract	*Acres*	*Assessed 1913*	*Assessed 1914*	*Basis actual valuation*
41	57/100	$340	$4,335	$15,210
36	17/100	240	2,040	24,000
37	93/100	140	1,785	3,838
27	48/100	320	1,190	4,962
28	7/100	45	400	11,428
26	51/100	135	1,105	4,334
		$1,220	$10,855	

The basis for valuation in each year was fifty per cent of the actual value. The tender made by appellant was based upon a value of $658.60 per acre. There is no testimony tending in any way to show that there had been any increase in the value of the lands.

The land was assessed under a theory or plan advanced by a deputy assessor, who selected a tract of tide land about midway of the water front of Aber-

deen and about two hundred feet deep, and then fixed zones running in either direction. Property was assessed by graduated valuations with reference to the value of the primary unit, eighty per cent being fixed on account of water frontage, and twenty per cent on account of area. The assessment is further defended on the ground that the tide lands were of greater value than other lands would be, because, as it is conceived, the owner of the tide lands would have, under the laws of this state, a preference right to lease the harbor area.

When this case was heard, the late Judge Morris was sitting with the court. After consultation, three of the judges, including Judge Morris, were of the opinion that the assessment had been made upon a fundamentally wrong basis, in that the zone system, if sustained by an arbitrary holding of value within the zone, was based upon the value of the central unit rather than upon the full fair cash value of the property taxed, which may be greater or less, depending entirely upon its situation and adaptability for commercial uses; and for the further reason that the assessor's theory of preference right to lease the harbor area could not be sustained, for the time has long since passed when a preferential right could be exercised. Two of the judges were of the opinion that the case should be reversed on the evidence of value, and it is upon this ground that the judgment will be questioned.

The consensus of opinion of no less than twelve of the most prominent property holders in Grays Harbor county is to the effect that the tide land tracts have no practical value apart from the uplands, and that the whole property, tide land and upland, when considered as one property, is not worth to exceed $40 to $50 per acre. It will be borne in mind that the upland is assessed on a valuation of $100.

The agent of the owner of the land, Mr. Heermans, testified that he has the whole tract, 450 acres of upland and the 2.73 acres of tide land, listed for sale at $25,000, less than $60 per acre, with no offers, and that "it can be purchased at a good deal less money than that, too. I am authorized to sell to any taker at these figures without calling upon the owner, and I am instructed to submit any other offer made."

The witnesses who were interrogated upon the subject say that the tide land tracts cannot be put to any use apart from the uplands, and that there was no demand for such lands at the time they were assessed; as one witness says: "These lands have a value if you consider the upland and the tide land and the harbor area together, that is, if there was any demand for it," and "I would consider it merely a nominal value. Good to hold up the owner of the inside in the hands of an unscrupulous person." This sentiment is concurred in by some of the other witnesses, and when the testimony of the deputy assessor is sifted, it is really the basis upon which he fixed values so greatly in excess of the values for market or for practical uses. He says:

"In making this assessment I made it under the theory or belief that the law permitted the adjacent owner to control the adjacent harbor area. I took into consideration that they were using the entire lot of thirty-eight and didn't confine themselves to the eighty-eight feet. (Ab. 89.) And in assessing all of this we took into account the fact, or supposed fact, that the adjacent owner had the preference right to lease the harbor area in front of it. (Ab. 90.)"

Counsel for respondent says:

"The tideland owner holds the key to the situation and values his lands accordingly. He has a special class of property because of its peculiar situation, and

inasmuch as he can demand a high price for such property he holds it accordingly."

But, as applied to this case, the theory is not sound. If a third party owned the shoestrings along the river and it seemed reasonable that he would be able to sell them to an upland owner now or at some future time, it might be that an assessor could capitalize his hope for him, at least so far as the tax rolls are concerned, and that the courts would sustain his paper profits as a true, fair cash market value; but where the same party owns the two tracts, and there is no possibility of a sale to the upland owner so that he may get access to deep water, and the tide land strips have no value, potential or prospective, for building purposes, there is no possible ground upon which to base the fanciful values fixed by the assessor.

There is a popular tradition, launched in the years of the state's adolescence, that tide lands as distinguished from other land have some mysterious quality to which value attaches, and which will not brook the interference of doubt or argument; but, after all, tide lands are only lands. They may be of great value, or they may have little value. But all things are to be considered; the same elements which give value to one class of land will give it to another, and when land which for the purpose of classification is listed as tide land and sold by the state, it is no longer to be regarded as of a class but as property, and to be valued according to its fair cash value.

This case is very much stronger upon its facts than is the case of *Grays Harbor Construction Co. v. Grays Harbor County*, 99 Wash. 184, 168 Pac. 1138, where we refused to sustain an assessment based upon a value more than three times greater than the salable value of the property.

It is insisted that the judgment should be sustained because it is shown that the Standard Oil Company bought a tract, one and one-half acres, of tide lands and about two acres of upland, having a frontage of 575 feet, for $7,500, in 1914. The tide lands were assessed at $2,125, and the upland at $1,200. It may be that the property was well worth that sum, and that other tracts would sustain a greater value, but the law will not tolerate a valuation fixed by comparisons, where the testimony overwhelms that the particular tracts in controversy have no such value. But we find no argument in these figures. The tide land sold to the Standard Oil Company, was assessed upon a valuation of $4,250 per acre. Let this compare with the assessment of appellant's property, which is confessedly less valuable.

Tract	41	is	assessed	at	$15,210	per	acre
"	36	"	"	"	24,000	"	"
"	37	"	"	"	3,838	"	"
"	27	"	"	"	4,962	"	"
"	28	"	"	"	11,428	"	"
"	26	"	"	"	4,334	"	"

And the assessment of other water front property not shown to be less valuable than appellant's property at from $10 to $250 per acre.

The valuation is not sustained by the testimony, nor is the assessment equal and uniform with other like property. *State ex rel. Wolfe v. Parmenter,* 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; *Spokane & Eastern Trust Co. v. Spokane County,* 70 Wash. 48, 126 Pac. 54, Ann. Cas. 1914B 641; *Savage v. Pierce County,* 68 Wash. 623, 123 Pac. 1088; *State ex rel. Oregon R. & Nav. Co. v. Clausen,* 63 Wash. 535, 116 Pac. 7.

Tender having been made upon a valuation of $630 per acre, which is far above the fair cash value of the

property as shown by the testimony, the case will be reversed with instructions to enter a judgment in favor of appellant.

ELLIS, C. J., and MOUNT, J., concur.

HOLCOMB, J., concurs in the result.

[No. 14403. Department Two. May 7, 1918.]

T. K. COURTIS, *Respondent*, v. FREEBURN COAL COMPANY, *Appellant*.[1]

APPEAL — REVIEW — FINDINGS. Findings on conflicting evidence will not be disturbed on appeal where it cannot be said that the evidence does not preponderate against them.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 5, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Robertson & Miller, for appellant.

Nuzum, Clark & Nuzum and *Geo. H. Armitage*, for respondent.

PARKER, J.—The plaintiff, Courtis, commenced this action seeking recovery from the defendant company compensation claimed to have been earned by him in the form of commissions agreed to be paid to him for his services in making sales of shares of its capital stock in pursuance of a contract entered into with him. Trial in the superior court for Spokane county sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

[1]Reported in 172 Pac. 860.

The contentions here made in appellant's behalf have to do only with questions of fact, (1) as to the making of the contract, and (2) as to whether or not respondent's efforts were the effectual cause of the sales which were proven to have been made. Both of these questions are to be determined from evidence which was almost wholly oral. We have read all the evidence with care. It is in serious conflict in so far as the testimony of interested witnesses is concerned. There was, however, testimony given by one or two disinterested witnesses throwing some light upon both of these questions which we think warranted the trial court in rendering the decision it did. We cannot say that the evidence does not preponderate in support of the trial court's decision. To review the evidence here would be but to discuss it with a view of determining the comparative credibility of the witnesses. This we deem unnecessary. It is not contended that the contract was illegal. Apparently the shares of stock were held by the company under such conditions that it had a lawful right to secure their sale in this manner.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14436. Department One. May 7, 1918.]

ALICE E. C. GIBSON, *Appellant*, v. NEW YORK LIFE INSURANCE COMPANY, *Respondent*.[1]

INSURANCE—LIFE INSURANCE—PAYMENT OF PREMIUM. Under Rem. Code, § 6059-180, providing that no life insurance company shall make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy, and Id., § 6059-184, providing that the policy and application shall constitute the entire contract between the parties, a policy of life insurance is avoided where the full premium was not paid in advance as required by the terms of the policy and it was paid to a soliciting agent who had no right to receive it because he did not deliver a receipt therefor as specified in the contract, and it was not shown that the company ever received the premium.

SAME—POWERS OF AGENT—EVIDENCE—DOCUMENTS. Upon trial of action on a life insurance policy, evidence of only part of the contract to show the agent's authority is properly excluded, where his powers could be determined only by the entire contract.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 6, 1917, upon granting a nonsuit, dismissing an action on a life insurance policy, tried to the court and a jury. Affirmed.

Vince H. Faben, for appellant.

H. T. Granger (*Jas. H. McIntosh*, of counsel), for respondent.

MAIN, J.—The plaintiff, being the beneficiary named in a life insurance policy, brought this action upon the policy. After the issues were framed, the cause in due time came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant challenged the legal sufficiency thereof and moved the court for a judgment of dismissal. This motion was sustained, and a judgment entered as requested. From this judgment, the plaintiff appeals.

[1]Reported in 172 Pac. 920.

The facts are these: On August 4, 1913, one Winfield Fuller, then the soliciting agent for the respondent company, took an application from William C. Gibson, the husband of the appellant, for a $10,000 life insurance policy. On September 4, 1913, the policy was issued and delivered to the insured. The annual premium on this policy was $536.80. The first premium was paid at the time the policy was issued. The subsequent premiums, in like amount, were to be paid on the 4th day of September in every year during the continuance of the policy until the death of the insured. William C. Gibson, the insured, died on the 9th day of June, 1915. After the death of the insured, the respondent declined to pay the beneficiary the sum mentioned in the policy, claiming that the policy had lapsed because the second year's premium had not been paid when due, or at all. On December 10, 1914, the beneficiary paid the soliciting agent $185 as the balance due upon the second year's premium. It will be assumed that, prior to this time—the exact date of which is not fixed—the insured paid to the soliciting agent the second year's premium, except the $185 mentioned as being paid on December 10th. The evidence does not show that the respondent at any time received the money for the second year's premium. The fair inference from the evidence is that it did not receive it.

The policy contained a provision that all premiums were payable on or before the due date at the home office of the company, or to an agent of the company upon delivery of a receipt signed by the president or other specified officer of the company and countersigned by the agent. When the $185 was paid by the beneficiary, she received no receipt therefor as required by this provision of the policy. Another provision of the policy was that the premium was always considered as payable annually in advance, but by

agreement in writing, and not otherwise, might be made payable semi-annually or quarterly. There was no agreement such as required by this provision of the policy whereby the payments should be made other than annually in advance. There was also a provision that the policy and the application should constitute the entire contract between the parties, and that no agent was authorized to waive forfeitures, or to make, modify or discharge contracts, or extend the time for paying a premium. The application provided that only the president, a vice president, a second vice president, a secretary or the treasurer of the company could make, modify or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts could be done by the agent taking the application.

In § 180 of the insurance code (ch. 49, Laws of 1911, p. 260; Rem. Code, § 6059-180), it is provided that no life insurance company doing business in this state, or agent, subagent, or broker thereof, shall make

"any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy . . . ;"

According to subdivision (3) of § 184, p. 261 (Rem. Code, § 6059-184) it is provided that a life insurance policy such as the one upon which this action is based must contain a provision that the policy and the application therefor "shall constitute the entire contract between the parties . . . ." This law was passed prior to the time that the application for the insurance here involved was taken. It is not claimed that the policy in any respect fails to meet the requirements of the statute. From what has already been said, it appears: First, that the full premium was not paid in advance as required by the terms of the policy; and second, that it was paid to the soliciting agent, who had no

right to receive it because he did not deliver a receipt therefor as specified in the contract. The appellant cites the case of *Hall v. Union Central Life Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. 844, 51 L. R. A. 288, as controlling. The respondent cites the case of *Nixon v. Travelers' Insurance Co.*, 25 Wash. 254, 65 Pac. 195, as supporting its contention. It is unnecessary to review those cases. They were both decided prior to the passage of the insurance code by the legislature in 1911. Under the facts in this case as to the payment of the second year's premium and the terms of the policy, it is plain that the judgment of the trial court was right. One of the purposes of the statute was to require that the policy and the application should constitute the entire contract. The insured and the beneficiary, as well as the insurer, are charged with knowledge of this requirement. Had it been shown by the evidence that the second year's premium had been actually received by the respondent, even though not paid at the time and in the manner required by the contract, a different question would be presented, upon which we here express no opinion.

Upon the trial, the appellant offered in evidence two provisions of the contract between the company and the soliciting agent, but did not offer the entire contract, and for this reason the offer was rejected. There was no error in this ruling. The powers of the soliciting agent could only be determined by a reading of the entire contract. In addition to this, the provisions offered, if received, would not have changed the result, as the agent's authority was not substantially different from that specified in the policy.

The judgment will be affirmed.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ., concur.

[No. 14458. Department One. May 7, 1918.]

GODFRIED HAMP *et al.*, *Appellants*, v. PEND OREILLE COUNTY, *Respondent*.[1]

HIGHWAYS—ESTABLISHMENT—PRESCRIPTION—TRAILS. The adverse use of a trail by travelers on foot and horseback and by pack trains and "go-devils," consisting of two poles dragged by horses, for the transportation of goods, for over thirty years, constitutes the same a highway by prescription, although the same was not used by wheeled vehicles.

SAME—ESTABLISHMENT BY PRESCRIPTION—WIDTH. A highway by prescriptive use of a trail by travelers on foot and horseback is not limited to the actual path traveled, twenty-four inches or less, but may be fixed at twelve feet, where such width is reasonably necessary for the public easement, required for passing as well as traveling in one direction.

Appeal from a judgment of the superior court for Pend Oreille county, Jackson, J., entered April 8, 1916, upon findings in favor of the defendant, in an action to quiet title, tried to the court. Affirmed.

A. C. Shaw, for appellants.

Chas. H. Leavy, for respondent.

PARKER, J.—The plaintiffs, Hamp and wife, seek recovery of a strip of land running through their farm, and the quieting of their title thereto as against the claim of the defendant county that the strip is a public highway acquired by the continued adverse use thereof by the public for a period of more than ten years. Trial upon the merits in the superior court for Pend Oreille county resulted in findings and judgment denying to the plaintiffs the relief prayed for, and declaring that the public had acquired by prescription a highway along the strip in question to the extent of twelve feet in width, being six feet on each side of a described cen-

[1]Reported in 172 Pac. 869.

ter line following the center of the traveled portion of the highway. From this disposition of the cause, the plaintiffs have appealed to this court.

The way here in question is a trail rather than a road, in a popular sense; that is, it has been used by the public for travel by means other than that by wheeled vehicles. It was commenced to be used by white men about the year 1889, and has been continuously used by the public ever since. Prior to that time it was apparently used by the aborigines in their travels north and south over the rough and mountainous country in the extreme northeast corner of the state. From 1889 to 1914, it was the only practicable way of travel from the town of Metaline, in Pend Oreille county, north to and beyond the Canadian boundary, and acquired the name of "The Boundary Trail." During all of those years it was the constant way of much travel by people on foot and on horseback, and of the transportation of goods by means of pack horses and by crude conveyances called "go-devils," consisting of two poles attached one to each side of a horse with the ends dragging behind, somewhat like a sled, on which goods would be carried. The actual traveled trail consisted of little else than the part over which people and horses walked, and was some eighteen to twenty-four inches wide, the "go-devil" occupying a somewhat wider space. While the county never expended any money in the improvement of this trail, it was improved in some measure from time to time by those interested in its use, and in later years this improvement consisted in cutting out trees and brush to a width of some eight feet. This was done across appellant's land, not only with their consent, but with their assistance to some extent. The trail seems to have been used somewhat less since 1914 than prior thereto because of the construction of another

road, but it is still used, and necessarily so, by a number of settlers in the neighborhood in going to and from their homes. It is plain from the evidence that the use of the trail during all these years has been open and adverse to the rights of all owners of land across which it runs.

While this trail was not traveled over by wheeled vehicles, except possibly to a small extent in very recent years, it was, we think, nevertheless used as a highway because of its use for public travel in the way suited to the conditions then prevailing. Travel and transportation of goods by wheeled vehicles is not the only use to which a highway may be put. One walking or riding horseback, or transporting goods by pack horse, over a way which the public is constantly using is a use of such way as a highway, in a legal sense. 13 R. C. L. 17; 37 Cyc. 15; 1 Elliott, Roads and Streets (3d ed.), 4; 2 Words and Phrases 882. This being the law, it seems to follow, as a matter of course, that a highway of the nature here in question can be established by prescription as well as if it were used by wheeled vehicles. The contentions made in behalf of appellants that the use of this trail has not been such as to result in the public acquiring a highway along it by prescription, we think are untenable in the light of the evidence showing the facts as above summarized. *Seattle v. Smithers,* 37 Wash. 119, 79 Pac. 615.

It is further contended in appellants' behalf that the trial court erred in decreeing that the public had acquired a highway along this trail to the extent of twelve feet in width. The argument seems to be that the public's right in this regard is measured by the portion of the trail actually used for travel, that is, the actual track or path made by the walking of people and horses. It seems to us that this contention is answered by our decision in *Yakima County v. Conrad,*

26 Wash. 155, 66 Pac. 411, and by our later decision in *Olympia v. Lemon,* 93 Wash. 508, 161 Pac. 363. In the *Conrad* case, Judge White, speaking for the court, observed:

"After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. *Whitesides v. Green,* 13 Utah 341 (44 Pac. 1032, 57 Am. St. Rep. 740); Elliott, Roads & Streets (2d ed), § 174, and cases cited. It is generally a question of fact to be determined under the circumstances of each particular case, and the easement may be as broad as the public require for passing as well as traveling in one direction. *Davis v. Clinton,* 58 Iowa 389 (10 N. W. 768)."

See, also, *Montgomery v. Somers,* 50 Ore. 259, 90 Pac. 674; *Marchand v. Town of Maple Grove,* 48 Minn. 271, 51 N. W. 606; *Arndt v. Thomas,* 93 Minn. 1, 100 N. W. 378, 106 Am. St. 418.

It seems quite clear to us that the use of this trail was such as to warrant the trial court in concluding that the public had acquired a highway right therein by prescription to the extent of at least twelve feet in width.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

[No. 14538. Department Two. May 7, 1918.]

JAMES CLARK, *Respondent*, v. FRANK GROGER *et al.*, *Appellants*.[1]

CORPORATIONS—DISSOLUTION—POWERS OF TRUSTEES. A corporation with defined powers limited to the manufacture and sale of beer and the operation of a brewery, is not dissolved by the state-wide prohibition law; and its stockholders are not thereby made tenants in common of its property, but as between stockholders, it may engage in any lawful business, and the trustees have power to assemble its assets and liquidate its indebtedness and, pending a formal dissolution, conduct its affairs.

SAME—RIGHTS OF STOCKHOLDERS. A stockholder of such a corporation dispossessed by stockholders in control of the stock, has no right to assert possession over other stockholders, by reason of his former control of the majority of the stock.

TROVER AND CONVERSION—WHAT CONSTITUTES—CLAIM OF TITLE—TRUSTEES OF CORPORATION. Corporation trustees are not guilty of a conversion in taking possession of the property of a stockholder, where, by resolution, they disclaimed any intention of claiming the same as owners, admitted the adverse title, and demanded its removal from the plant.

SAME—TRUSTEES OF CORPORATION—LIABILITY. One refusing to remove his property on demand of trustees of a corporation, cannot hold the trustees liable for the value of the property used, as for a conversion by them, his remedy being against the corporation for an accounting for the property used by it.

CORPORATIONS—RIGHTS OF STOCKHOLDER. Where a stockholder's operation of a corporation plant was by sufferance only, without any right of possession, upon dispossession he cannot recover for lost profits anticipated in continuing the business.

Appeal from a judgment of the superior court for Kittitas county, Davidson, J., entered May 16, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Reversed.

Eugene E. Wager and *Bogle, Graves, Merritt & Bogle*, for appellants.

Ralph Kauffman, for respondent.

[1]Reported in 172 Pac. 1164.

CHADWICK, J.—For fifteen or twenty years prior to January 1, 1916, the Ellensburg Brewing & Malting Company, a corporation, had engaged in the manufacture of beer and conducted a brewery business at Ellensburg. With the dawn of that day its occupation was gone. At the time the earth slipped out from under it, James Clark, the plaintiff, was the owner of stock of the par value of $13,500. Frank Groger owned stock of the par value of $11,500. Clark conceived the idea of operating the plant as a place for the manufacture of soft drinks, etc., and accordingly leased the stock of Frank Groger. Clark, with one August Sold, former brewmaster, who owned ten shares of the stock, at once began to manufacture near beer, cider and other products upon a profit-sharing basis. The annual meeting of the stockholders occurred on May 10, 1916. Clark voted his own and Groger's stock. He was thereafter elected president by the trustees of his own choosing. He had already taken possession of the plant and all of the personal property and stock on hand of the brewing company and put it to the uses of the new business.

In the summer of 1916, Groger, who after the lease of his stock had gone to California for his health, returned and began buying other outstanding stock, including Sold's stock, so that, at the time the lease expired on January 1, 1917, he was the owner of 181 shares, being a clear majority of the whole. A part of this stock was taken over in the name of his wife, Emma Groger, and a part in the name of his son, Casper Groger.

On January 6, 1917, at a special meeting of the stockholders, Casper Groger, son of Frank Groger, and Emma Groger, wife of Frank Groger, were elected trustees in place of Sold and one Brown, whose stock had been bought by Groger. It is said that the mother

and son never qualified as trustees, but they assumed to act as such, for, at a meeting of the trustees held on January 19, 1917, the following proceedings were had:

"Upon motion of Emma Groger, duly made and seconded and carried by a vote of all trustees present, it was ordered that as the brewing building was idle, and that the occupancy of the Ellensburg Bottling Works had terminated, that the same be at once operated by the company for the making and manufacturing and selling of soft drinks and substitutes for beer; and that as the vats in said building were being injured and destroyed by being filled with vinegar and other materials, that they be cleaned and the vinegar and so forth be removed therefrom, and work on the cleaning and operating of said plant commence at once, and the trustees proceed at once to take the necessary steps to operate said plant, and notify Clark to remove the vinegar and so forth therefrom."

Clark was not present at this meeting, although he had called the meeting and given notice of the time and place where it was to be held.

On January 26, 1917, Mrs. Groger and August Sold went to the brewery and notified plaintiff that it was the intention of the corporation to take possession, and called upon him to remove his property. When he returned after his dinner hour he found the doors barred and locked and a guard in charge, who informed him that he would not be permitted to enter. He did enter the building later in the afternoon, after securing permission from Groger and a pass from his attorney. Plaintiff did not remove any of his property at that time, nor did he attempt then or thereafter to do so. Being convinced, however, that the defendants, as trustees for the corporation, were about to engage in the business of manufacturing soft drinks, and conceiving that such an undertaking was *ultra vires* of the corporation as its powers had been defined in its

articles: "the manufacture and sale of beer, and to establish, conduct and operate a brewery," he brought an action to restrain the further prosecution of the business. Such proceedings were thereafter had in that case that a receiver was appointed and he took possession of all of the property then on hand, that owned by plaintiff, as well as that which was admittedly the property of the Ellensburg Brewing & Malting Company.

Before passing to the pertinent issues, let it be known that plaintiff never made any demand upon the receiver for the property he now claims, nor has he ever accounted to the receiver or to the corporation for the use of its property in the prosecution of his individual business.

Contrariwise, he brought this action on the 6th day of February, 1917, against these defendants, as individuals, to recover damages as for conversion of the property owned by him individually at the time he was ousted of his possession. He fixes his damages as the value of the property at the time of the alleged conversion, and anticipated profits upon the sale of stock on hand and goods to be manufactured out of unmanufactured stock.

Although combated vigorously at all stages of the proceeding and at the trial, the trial judge followed the theory advanced by plaintiff and has rendered a judgment against the defendants Groger upon the verdict of a jury in the sum of $5,000. A verdict was returned in favor of Sold, who was made a party defendant.

Plaintiff's whole case is predicated upon the assumption that the Ellensburg Brewing & Malting Company, having corporate power limited to "the manufacture and sale of beer, and to establish, conduct and operate a brewery," had no legal existence after the first day of January, 1916, (a) because its corporate

powers were impliedly repealed by the spirit, if not the terms, of the prohibition law and (b) under the general rules of law as they pertain to defunct corporations, the trustees having no power to engage in the brewing business or to do anything other than to wind up the affairs of the corporation and to distribute its assets, it follows that they are liable as individuals. Counsel says:

"Our contention is that the shareholders of the corporation become at once tenants in common of this property, subject, however, to the lien of the dead corporation's debts. See Cook on Corporations, § 641. Now, the law unquestionably is that co-tenants have equal rights to the possession and occupancy of the property of which they are co-tenants. 7 Ruling Case Law, Co-Tenancy, paragraphs 14 and 15.

"And so when the corporation died on January 1, 1916, Clark had a perfect right to enter into the occupancy of the tangible property of the defunct organization, and could maintain that occupancy against his fellow-shareholders. Indeed, if anything, he had the best right to enter into such occupancy because he was by long odds at that time the largest shareholder as owner and lessee. So that, so far from being a trespasser when he went into the occupancy of the property, he was only exercising what were his unquestionable and undoubted rights. It may be true that he might be called to account by his co-tenants for the reasonable rental or value of the occupancy in question, but that is very far from saying that he was not rightfully there, and that he might be rightfully dispossessed."

We cannot follow counsel in his contention that defendants were without power to act as trustees. Trustees of a corporation have a general power to wind up a defunct corporation; that is, assemble its assets, liquidate its indebtedness and, pending a formal dissolution, conduct its affairs. And as between stockholders, it may engage in any lawful business, wheth-

er within or without the powers as defined by its franchise, and continue to do so until restrained at the suit of a stockholder—which was done in this case at the suit of plaintiff—or by the state *ex rel.*, under a writ of *quo warranto*. 7 R. C. L., Corporations, § 516. If this view is sound, it follows that the stockholders of the Ellensburg Brewing & Malting Company were not tenants in common. But, if it were held otherwise, plaintiff is in no position to assert a right of possession over his fellow stockholders. His dispossession and their possession would put them in the same position he was in when in possession. If plaintiff had a right of possession by reason of stock control, defendants would have the same right when in control. We are not committing ourselves to this doctrine, but advance it only to show that, if there be merit in the theory of plaintiff, he is hoist by his own petard.

Plaintiff had certain property, apples, malt, etc., and some manufactured products on hand at the time he was ousted and the brewing company started in the business of manufacturing soft drinks on its own account. The receiver would, no doubt, be liable to account for the value of these goods, subject, of course, to an accounting on the part of plaintiff for such goods as were on hand and used by him at the time he began to manufacture on his own account.

But it is insisted that, even though it be held that the act of taking possession of the brewery plant was the act of the corporation, the taking being in the nature of a trespass, the officers of the corporation who participated in the act are personally liable to answer in a suit for conversion. 7 R. C. L., Corporations, § 493. We have heretofore affirmed this principle. *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 60 Wash. 559, 111 Pac. 774.

But it cannot be held arbitrarily that the mere taking of goods is sufficient to sustain an action for conversion. A wilful, or even an unlawful taking, will not always amount to conversion. There must be some assertion of right or title that is hostile to the true owner. In the instant case, the trustees, by resolution, disclaimed any intention of claiming as owners. They not only admitted the title of the plaintiff, but made a demand that he remove his property. His answer to this demand was not made with a moving van, but by filing an action in damages for conversion.

This phase of the case is learnedly treated in *Lee Tung v. Burkhart,* 59 Ore. 194, 116 Pac. 1066, where it is said:

"In an action of trover it is not sufficient that the facts show a mere trespass, without showing a conversion . . . There may be an actual, wrongful exercise of dominion over chattels without constituting a conversion, if such dominion is not a denial or repudiation of the owner's right or title."

And this we understand to be the doctrine of *Browder v. Phinney,* 37 Wash. 70, 79 Pac. 598.

In answer to this it may be urged that the use of the malt, apples and manufactured stock was the assertion of a right in derogation of the title of the plaintiff. This would be so ordinarily, but the personal liability of the defendants could not be extended over a time beyond which plaintiff should have removed his property in obedience to the demand of the trustees. He had his choice of remedies. He could comply with the request of the trustees and remove his property, or he could undertake to sell it to the corporation or to the trustees as individuals by resort to a claim for damages as for a conversion. He chose to hold the trustees as individuals and must fail, for it is shown

that his loss, if any, is due to his own omission. He cannot recover upon a personal liability the value of that which he might have had for the taking. His remedy, if any, is against the corporation.

While it is not necessary to a decision in this case, it may not be out of place to observe that, in the adjustment of the rights of plaintiff and of the corporation, plaintiff could not recover as for lost profits. His occupation of the brewery plant was at sufferance only. The trustees had a right to repossess themselves of the plant for the benefit of the corporation. His right to recover lost profits would depend upon his right to manufacture at the brewing plant. This he did not have, and it follows that his loss on unmanufactured products, if any, must be measured by the value of his goods at the time of the taking.

Reversed, and remanded with instructions to entertain appellants' motion for judgment.

ELLIS, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 14567. Department Two. May 7, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Harvig Ellertsen, Respondent,* v. HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE, *Appellant.*[1]

TELEGRAPHS AND TELEPHONES — FRANCHISES — POWER TO GRANT — STATUTES. Rem. Code, § 9314, which gives a telephone company the right to maintain lines along any public road, provided that, where the right of way is in an incorporated city, the "consent" of the city council shall be first obtained, does not prevent a city from granting a franchise controlling the rates that may be charged.

SAME. A city of the first class has power to grant a telephone franchise for the use of the city's streets and alleys, with limitations on the rates that may be charged, under Rem. Code, § 7507, subd. 7, empowering first-class cities to regulate and control the use of streets and alleys and to authorize or prohibit the use of electricity at, in or upon them, and to prescribe the terms and conditions upon which the same may be used and to regulate the use thereof.

SAME—FRANCHISE—POWER TO GRANT—STATUTES—IMPLIED REPEAL. Rem. Code, §7507, subd. 7, empowering cities of the first class to grant telephone franchises for the use of its streets and alleys, was not impliedly repealed by the enactment of the general telephone franchise act of 1890, Id., § 9300 *et seq.*

SAME—FRANCHISES—CONDITIONS. A telephone franchise ordinance limiting the amount of the rates or charges is a contract obligation, binding until abrogated by the state in the exercise of its police power; and the company having accepted and agreed upon the terms cannot complain thereof until relieved by the public service commission.

SAME—CONDITIONS—RELIEF—FILING SCHEDULE OF RATES. In such a case, a franchise limiting one-party residence rates to $2 is not affected by the company's filing with the public service commission a schedule raising the rate to $3, where there was no compliance with Rem. Code, § 8626-43, requiring affirmative action by the public service commission directing the termination of contracts in order to relieve the company from its contractual obligations to users of its service.

MANDAMUS—WHEN LIES—TO PUBLIC SERVICE CORPORATIONS—TELEGRAPHS AND TELEPHONES. The users of a telephone service have a right to apply to the courts for a writ of mandate to compel the

[1]Reported in 172 Pac. 899.

company to perform its contract obligations, there being nothing in the public service commission act requiring that they seek a remedy before any special tribunal.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 19, 1917, upon findings in favor of the plaintiff, in an action for a writ of mandate, tried to the court. Affirmed.

Post, Russell, Carey & Higgins, for appellant.

J. M. Geraghty and *Alex M. Winston,* for respondent.

WEBSTER, J.—The appellant has been operating, since 1905, a telephone system in the city of Spokane. The franchise granted it provided that the charge for telephones installed in private residences should not exceed $2.25, with a discount of twenty-five cents per month for cash payments made before the 10th day of the month in which the service is rendered. For the sake of brevity we will refer to this as the $2 rate. After the passage of the public service commission law in 1911, the appellant filed with the public service commission a copy of its franchise showing the above rate. Subsequently the appellant consolidated with another telephone company which had theretofore been operating in Spokane but which had lost its franchise, and on January 18, 1915, the appellant filed with the public service commission a rate schedule to be effective on February 20, 1915, naming as its rate for a single party residence telephone the sum of $3 per month instead of the $2 rate as provided in appellant's franchise. The relator brought this action seeking a writ of mandate directing the appellant to install in his residence a single party telephone service at the $2 rate. The peremptory writ was issued by the superior court, and this appeal followed. The question presented thereby is whether the superior court, by mandamus, has juris-

diction to compel the appellant to furnish service for a single party residence telephone at the $2 rate, that rate being lower than the rate set forth in the tariff filed by the appellant with the public service commission.

The contention of the appellant is that the rate provision in the franchise never was a contract, and that the city in granting a franchise had no authority to fix a rate, and that, even assuming that the franchise rate was valid and enforcible, it was superseded by the enactment of the public service commission law and the filing by the appellant of a tariff under the provisions of that act.

Section 9314, Rem. Code, provides:

"Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway. . . . Provided, further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

In *State ex rel. Spokane & British Columbia Telephone & Telegraph Co. v. Spokane,* 24 Wash. 53, 63 Pac. 1116, this court held:

"The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute."

In the case of *Commercial Elec. Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592, in which the court was considering an ordinance granting a franchise to an electric company to furnish power to business portions of Tacoma, this court, in referring to the franchise ordinance, said:

"The ordinance which was sought to be repealed was in the nature of a contract, and it was not in the power of one of the contracting parties to destroy the rights and property of the other by merely declaring the contract abrogated."

The appellant, however, contends that there is no express delegation by the state to the city of the power to impose terms as to rates in the granting of consent to operate a telephone system. This express question was passed on adversely to this contention in *State ex rel. Tacoma v. Sunset Tel. & Tel. Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F 1178, where Judge Holcomb, speaking for the court, said:

"We are not impressed with appellant's contentions (1) that the city had no power to attach conditions to the Webster franchise; and (2) that, even if it had the power to attach conditions, the conditions attached were void.

"The state had previously delegated to cities of the first class, of which relator is one, the general power 'to lay out, establish . . . streets, alleys . . . and to regulate and control the use thereof, . . . and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof.' Rem. & Bal. Code, § 7507, subd. 7.

"Though appellant insists that this statutory provision is not a grant of power in regard to telephone franchises, because 'it does not, in express terms, refer to telephone lines, or purport to confer the right to grant telephone franchises,' we do not agree there-

with. The power is both generally and specifically conferred.

"Again, appellant urges that, even if the power were conferred by § 7507, *supra,* it was repealed by the subsequent enactment by the same legislature of § 9314, Rem. & Bal. Code (Laws 1890, pp. 292-294; Rem. & Bal. Code, § 9300 *et seq.*), being the general telephone franchise act. These contentions were certainly decided adversely to appellant's views in *State ex rel. Spokane & B. C. Tel. Co. v. Spokane,* 24 Wash. 53, 63 Pac. 1116, and in *Tacoma R. & Power Co. v. Tacoma,* 79 Wash. 508, 140 Pac. 565. Notwithstanding appellant's argument to the contrary, in both the cases mentioned, it was distinctly held that the power to regulate and control the use of the streets was conferred by § 7507, subd. 7, *supra,* including the power to attach conditions. The question is not open to debate. All the conditions imposed were within the city's corporate powers and valid conditions attaching to the franchise. Indeed, if not, then Webster never obtained the city's assent to the use of the streets and never had a franchise therefor."

In the later case of *State ex rel. Walker v. Superior Court,* 87 Wash. 582, 152 Pac. 11, the Tacoma case was cited with approval and we said:

"In the proviso in § 9314, it is said that the highways within the corporate limits of a city cannot be used without the consent of the city council. By the subdivision of § 7507 quoted, the city, in its corporate capacity, is given the powers specified therein. By the decision of this court in the case last cited, it is held, as already noted, that by that statute (§ 7507) the power is both generally and specifically conferred in regard to telephone franchises and right to impose conditions. The power of the city, therefore, with regard to telephone franchises and the right to impose conditions when such franchises are granted flows from a statute which gives that power to the *city,* as distinct from a statute conferring such power upon the legislative authority of the city. Herein lies the distinction between this case and the *Benton, Ewing* and *Dolan* cases.

Whether under the proviso in § 9314, which requires the consent of the city council before highways within the city can be used, the city council had the right to impose conditions, we need not here inquire, because it has already been held that the power to impose such conditions is derived from the other section of the statute referred to."

Thus the law is settled that the city of Spokane had the authority to fix in the appellant's franchise the telephone rates to be charged. If it is true that the city had the right to withhold its consent before a telephone company would be allowed to use its streets, and to impose as a condition of granting its consent the maintenance of certain rates to be charged to users of the telephone service, the telephone company accepting such franchise is, as long as it operates thereunder, bound by its terms unless relieved therefrom by the public service commission law. And it matters not what nomenclature may be used to describe the obligation of the franchise holder; whether it be called a contract, a condition, or as in *State ex rel. Webster v. Superior Court,* 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287, a grant, license or reservation. For, as said in that case:

"The power to fix and determine rates being within the police power, the city might *establish* rates, but that it could not, under the delegation quoted, *contract* so as to bind itself or the other party as against the exercise of the police power,"

which merely means that the rate established in the franchise is binding until the sovereign police power cuts the bond.

A franchise obligation is not less a contract because it may ultimately be abrogated by the state in the exercise of its police power than was the obligation set aside in the case of *Raymond Lum. Co. v. Raymond Light & Water Co.,* 92 Wash. 330, 159 Pac. 133, L. R. A.

1917C 574, not a contract because revocable. No one would suggest that, until the public service commission interfered, the relation between the two parties to that suit had not been that of two parties to a contract.

A different situation is presented by the fixing of rates *in* the franchise from that which arises in those cases where, *after* the granting of the franchise, the city has attempted to fix rates. This distinguishes the case of *Tacoma Gas & Elec. Light Co. v. Tacoma,* 14 Wash. 288, 44 Pac. 655, from the case at bar, for here the city could have consented, or refused to have consented, to the granting of a franchise, but having consented, it included in the franchise the terms upon which that consent rested. "These terms were accepted by the company and the ordinance discloses the contract between them. If the terms were distasteful to the company it could have refused them or at least protested against them." *Southern Bell Tel. & Tel. Co. v. Richmond,* 103 Fed. 31.

The appellant and the city of Spokane having agreed upon the terms under which the appellant was allowed to operate, thereby entered into a contract which each of them had authority to make, and good faith and fair dealing will not permit the appellant to occupy the streets of Spokane by virtue of its franchise and, at the same time, refuse to comply with the conditions thereof. It received from the city what it, at the time, deemed adequate consideration for its contract, and as long as it retains that consideration it must, in receipt therefor, perform the service at the price agreed upon, except as it may be relieved of those terms and conditions by the operation of the public service commission law.

That brings us to the consideration of the question of the effect of the filing of a schedule of rates by the

appellant with the public service commission. It having been held in *State ex rel. Tacoma v. Sunset Tel. & Tel. Co., supra,* that:

"In general, the provision was a valid condition with valid reasons to support it, and was an agreed provision of the contract. It was not, as appellant supposes, void as against public policy, nor *ultra vires* and void as beyond the corporate power of the city."

It is not necessary to, and we do not, decide in the determination of this case that the public service commission law interferes with the provisions contained in the appellant's franchise; but assuming that, by the act, the state did give the public service commission the right to modify the franchise rates, those rates would remain in effect until such time as the appellant has complied with the requirements of the act. Section 43 of the public service commission law (Laws 1911, p. 567) provides:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules or rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order." Rem. Code, § 8626-43.

We having decided that the rate provision in the franchise is a contract, it follows that § 43 covers the obligation owing from the appellant to the relator, for, under well settled principles, those citizens desiring

telephone service, being the beneficiaries of that provision of the franchise, would become to that extent parties to the contract, and the obligation of appellant would become a direct obligation to them. Before the appellant can charge a greater rate than $2 per month the public service commission must have done more than merely receive in its files a new schedule of rates. There must be affirmative action by the commission relieving the appellant of its contractual obligation to the users of its telephone service.

The public service commission not having acted upon the schedule filed by the appellant, and not having directed "by order that such contract shall be terminated by the telephone company," the contract still continues in effect. As was said in the case of *Seattle Elec. Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892.

"While the passage of the public utilities law does not abrogate contracts until the commission has fixed a different rate, it does not follow that the passage of the public utilities law may not withdraw from the city the right to exercise police power from and after the date it became effective."

In other words, after the passage of the public service commission law, the city no longer had any power in regard to rates charged by appellant, but the rates already provided for in the franchise remained in effect until the public service commission had taken some action regarding them. The mere filing of a new schedule of rates was insufficient to establish that schedule as a basis for the appellant's charges for service such as is demanded by the relator, in view of the provisions of § 43 (Id., § 8626-43).

The question presented here is not the question of the reasonableness of rates, but the question involves the contractual rate, and there is nothing in the public service commission law which provides that the relator

must seek his remedy before any special tribunal. In seeking to compel the appellant to furnish the service, which service it contracted to furnish, the relator had the right to apply to the courts for his relief, and not only had he the right, but he is seeking his relief before the only tribunal which could afford him a plain, speedy and adequate remedy. The public service commission, as is said by the judge of the superior court who heard this case,

"is not concerned with the enforcement of any contract, but is only concerned with the question as to the reasonableness of the rates about which the contract may speak."

There is no conflict of authority between the commission and the court, for the reason that the commission has not yet attempted to take jurisdiction of the rates provided for in the franchise, and, until such time, jurisdiction to enforce that contract rests with the court.

The city of Spokane having had the power to fix the rates in the appellant's franchise, and having done so, and the public service commission not having as yet assumed jurisdiction as provided in § 43 (Id., § 8626-43) of the public service commission law, it follows that relator was entitled to the installation of the telephone at the rate provided in the franchise, and the superior court was correct in issuing the writ prayed for.

Judgment will be affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14568. Department Two. May 7, 1918.]

J. SCHOMMERS, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—TRESPASSERS—"LAST CLEAR CHANCE"—EVIDENCE—SUFFICIENCY. The doctrine of the last clear chance does not apply to a case where a young man, sitting on the edge of a railroad track, was killed by a passenger train, where it appears that the noise of the train could have been heard for three minutes before the accident, and the brakes were set for the emergency stop 600 feet away when the engineer realized that he was not going to get out of the way, and the train brought to a stop within 800 feet; since the mere presence of a trespasser, even if seen, is not alone enough to set the doctrine in motion, as the engineer may assume that a trespasser will take some account of his own safety.

Appeal from a judgment of the superior court for Spokane county, D. F. Wright, J., entered July 18, 1917, granting a new trial, after granting motion for nonsuit, in an action for wrongful death. Reversed.

Charles S. Albert and *Thomas Balmer*, for appellant.

Carl Ultes, Jr., for respondent.

CHADWICK, J.—Ray Schommers, son of the respondent, aged sixteen years, had attended a dance at Elmira, Washington, on the night of August 14, 1915. He left the dance between the hours of four and five o'clock in the morning.

There is a public road running west from the town of Elmira, parallel with and adjoining the railroad right of way. The road crosses the track about a half mile west of Elmira, as nearly as the distance can be estimated from the testimony. The boy left Elmira going west on the railroad track. He crossed the highway and went 450 to 500 feet beyond and sat down on

[1]Reported in 172 Pac. 848.

the edge of the track—the end of a tie—where he was seen by an early passerby who drove his team over the track at the crossing and turned west on the highway. This witness says that the boy was sitting in a kind of stupor, holding his head between his hands. At that time the witness had turned west and was about 100 feet from the crossing. His attention was attracted by the steam popping off and the brakes coming on. The first thing he thought of was "what they were stopping for."

This witness heard the rumble of the train about three minutes before the accident. He says that the engineer did not whistle for the crossing but that he began to set the brakes about 100 feet east of the crossing, which would be approximately 600 feet from the point where the boy was killed. He estimated the speed at which the train was going at thirty miles an hour. A locomotive engineer testified that a train going thirty miles and slightly down grade could make an emergent stop in "2,000 to 2,500, maybe 3,000, feet." By deduction and calculation, the train was stopped in 600 feet, plus the length of two coaches and the engine, approximately 800 feet.

The court entertained a motion for a nonsuit and directed a judgment accordingly. Thereafter the court granted a motion for a new trial, and defendant has appealed.

The motion for a nonsuit was granted evidently upon the theory that the deceased was a trespasser and that defendant owed no duty to the deceased other than to refrain from wantonly or wilfully injuring him.

The motion for a new trial was granted evidently upon the theory that the case fell within the doctrine of the last clear chance, for it is argued here that, although the deceased was a trespasser, the engineer should have seen the boy in time to avoid striking him,

and that it was at least for the jury to say whether the engineer might have seen him in time to appreciate the fact that he was not conscious of his danger and in time to stop his train.

That the rule upon which the nonsuit was granted governs and that respondent cannot recover will not be gainsaid or denied, unless the rule of the last clear chance intervenes to save a right to recover.

The rule of the last clear chance is never dogmatic or self assertive. It arises out of the facts and as a legal consequence of other rules of law. It is no more than a rule of proximate cause (*Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943), and is applied or rejected as the facts of the particular case warrant its application or rejection.

Accepting the doctrine, does it apply in the case at bar? We think that it does not, and for reasons which we shall undertake to make plain.

The doctrine assumes, as we shall assume, that the engineer was negligent in that he sounded no warning for the crossing. It matters not in what the negligence consisted, whether of omission or commission. The premise upon which the last clear chance doctrine rests is that both parties are negligent, that one of them is unconscious of his peril, and that the one charged saw, or should have seen and appreciated, the situation of the one injured in time to have avoided the accident. In time, the last clear chance arose when the engineer realized, and should, considering all the facts, have realized, that deceased was in a situation of peril from which he was not likely to extricate himself. We have the time that the engineer realized that the boy was not going to get out of the way fixed to a moral certainty. It was when he cut off the steam and set the emergency.

"The instinct of self preservation and the instinct to refrain from harming others are always present in emergent situations affecting personal security. These impulses prompt that which is done." *Hartley v. Lasater,* 96 Wash. 407, 165 Pac. 106.

We have the place fixed by the only eyewitness testifying that it was about 100 feet east of the crossing, or 550 or 600 feet east of the place where the boy was sitting. The distance may have been 50 or 60 feet further. The testimony is not clear, in that it takes no account of the width of the public road. So that it is certain that the engineer began to stop his train when a distance of about two city blocks away. To hold him to the last clear chance would be to hold, as a matter of law, that the engineer of every train would have to slow down or stop his train whenever he saw a trespasser on the track, whereas the law imposes no such burden. On the contrary, the driver of a locomotive over a track fenced to protect those who operate or travel by train and wholly intended for the use of the railroad may assume that one who is upon the track will take some account of his own safety, at least to the extent of keeping a lookout for passing trains.

Every man who goes upon a railroad track courts danger, but it is not such a danger as will, in and of itself, invite the doctrine of the last clear chance. nor will the law presume that men will walk or sleep or sit down with head bowed on knees and become unconscious in such places.

The mere presence of the deceased would not, therefore, charge the engineer, when 2,000 to 3,000 feet away—plaintiff's argument rests on the assumption that he could have seen the boy when 2,000 to 3,000 feet away, and it would have taken that distance to stop his train—that deceased was asleep or unconscious and unable to take care of himself. His duty began when

he did realize the danger, and considering all the facts and the authority of our own cases, we think the engineer exercised reasonable care to avoid the accident. He acted when the peril became evident and imminent.

It must be borne in mind that this accident did not happen at a crossing or in a city street where rights are reciprocal and where a duty commensurate with the dangers of legitimate passing traffic was upon the engineer, nor was deceased on a trestle or in any extremity where it could be said that he would not be likely to extricate himself.

Reduced to its lowest terms, to hold the appellant to the rule of the last clear chance would be to say that the engineer should have known of the presence of the boy and that he might be asleep or unconscious when the train was at least 2,000 to 3,000 feet way.

We can only say, considering all the facts and inference from facts as revealed by the testimony: the fact that deceased was a trespasser, the noise of the train, which could have been heard for three minutes before the accident, the grinding of the wheels and the popping and hiss of escaping steam when 600 feet away, and the legitimate assumption that one in the situation of the deceased would take some care of his own safety, and the emergent stop made by the engineer, that, if the engineer is to be held to the doctrine of the last clear chance, he took that chance; that is, he did all that could be done in the time left to him to avoid the accident.

In so holding we grant that a railroad is liable even to a trespasser who is in a situation of evident peril, if those in charge of the train discovered the party killed or injured in time to have avoided the accident, for an injury under such circumstances would be classed as willful; but the mere presence of a trespasser, although seen, is not enough to set the doctrine

in motion, nor will it move until it can be said, as a matter of law, that the danger was so evident as to charge an engineer with a duty to stop his train in time to have avoided the accident.

The case of *San Antonio & A. P. R. Co. v. McMillan*, 100 Tex. 562, 102 S. W. 103, 11 Neg. & Com. Cases, note, p. 472, is as nearly like this one as can be found. The one who was killed was sitting on the track and failed to get off when the train came along. The train was running about thirty-five miles an hour. He was seen, but not recognized as a human being, when the train was about 400 feet away, by the fireman who rang the bell. The engineer saw him when about 300 feet away. He blew the whistle and set the brakes when about 200 feet away. It was then too late to avoid the injury, and decedent, who was sitting with "his head bowed with his face in his hands, was oblivious to the approach of the train."

The facts there, as here, contradicted any suggestion that, if the train had been checked, he would have gotten off the track, for he was evidently not in a condition to do so, whether asleep or unconscious. It was contended that the company was liable on the ground of discovered peril.

"In applying the doctrine of discovered peril the railroad company cannot be held liable because the servant was negligent in failing to discover the person or in failing to recognize his peril, but it must appear from the evidence that the servant actually saw the man, realized his peril, and that he would not get off the track. (*Texas & Pac. R. Co. v. Breadow*, 90 Tex. 26.) It must also appear that the discovery of the peril was in time for the trainmen by the use of the means at hand to stop the train before coming in collision with the man."

In *Southern R. Co. v. Stewart*, 153 Ala. 133, 45 South. 51, 11 Neg. & Com. Cases, note, p. 475. After

holding that a railroad company is under no duty to keep a lookout for trespassers, the court said:

"There was no evidence as to the speed of the train, none as to the position of the engineer on the train, none that the train could have been stopped any quicker than it was stopped, and none that the deceased could have been seen by the engineer in time to have stopped. The fact that the track at the place of the injury was straight for a mile and a half and that the day was bright and clear alone are not sufficient to authorize a reasonable inference that the engineer in fact discovered the deceased in time to have avoided the injury. The evidence shows that the deceased was lying down on the track between the rails, and there is no evidence that the engineer was looking forward at a time and place when the deceased could have been discovered in time to have stopped the train and avoided the accident, and it is a matter of common knowledge that engineers, in the operation of engines, have other duties to perform besides that of looking out, and, for aught that can be said, the engineer was at the time engaged in performance of some other of such duties. It would be an unwarranted speculation to leave it to the jury to say whether or not the engineer was at the time looking forward and did discover, or could have discovered, the deceased on the track in time to have avoided the injury by the exercise of due care."

Other cases and texts bearing upon the question presented are: *Imler v. Northern Pac. R. Co.*, 89 Wash. 527, 154 Pac. 1086, Ann. Cas. 1917A 933, L. R. A. 1916D 702; *Scharf v. Spokane & Inland Empire R. Co.*, 92 Wash. 561, 159 Pac. 797; *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32; *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63; *Hamlin v. Columbia & Puget Sound R. Co.*, 37 Wash. 448, 79 Pac. 991; *Moore v. Great Northern R. Co.*, 58 Wash. 1, 107 Pac. 852, 28 L. R. A. (N. S.) 410; *McCarthy v. New York, N. H. & H. R. Co.*, 240 Fed. 602.

The appellant being under no duty to anticipate the presence of the deceased on the tracks, being only bound to exercise reasonable care to avoid injuring him after discovering his peril, we are constrained to hold that the engineer did all that he could do within reasonable limits and within the time he had at his command.

Reversed, and remanded with instructions to overrule the motion for a new trial.

ELLIS, C. J., HOLCOMB, MOUNT, and WEBSTER, JJ., concur.

[No. 14584. Department Two. May 7, 1918.]

TACOMA ASSOCIATION OF CREDIT MEN, *Appellant*, v. FRANK LYONS *et al.*, *Respondents*.[1]

HUSBAND AND WIFE — ACTIONS — JUDGMENT — SEPARATE OR COMMUNITY DEBT. In an action against partners conducting a mercantile business in the interest of the community on *prima facie* community debts, in the absence of evidence to overcome the presumption, it is error to enter judgment against a husband "as a separate judgment only."

Appeal by plaintiff from a judgment of the superior court for Grays Harbor county, Abel, J., entered August 14, 1917, in favor of the plaintiff, upon default of the defendants, in an action to foreclose mortgages. Reversed.

W. W. Keyes, for appellant.

John Burton Keener, for respondents.

PER CURIAM.—The respondents, having given to the appellant their mortgage and notes, defaulted in this

[1]Reported in 172 Pac. 823.

action brought thereon, and the court rendered a deficiency judgment containing the following phrase:

"It is hereby ordered, adjudged and decreed that said plaintiff do have and recover judgment *as a separate judgment only* [our italics] as against the defendants, Frank Lyons, H. P. Kessinger and Guy S. Sheldon in the sum of—"

It is to that portion of the judgment which we have italicized that the appellant objects. The mortgages and notes having been given by the respondents Lyons and Kessinger in the conduct of a mercantile business owned by them as partners, the obligations, therefore, became *prima facie* community obligations, and no evidence having been introduced to overcome this presumption, the appellant was entitled to a judgment free from the phrase "as a separate judgment only." If, as a matter of fact, the judgment is not a community judgment, this question can be raised by the wives of the respondents at the proper time and in appropriate proceedings. *Woste v. Rugge,* 68 Wash. 90, 122 Pac. 988.

Judgment reversed, and remanded with orders to strike therefrom the phrase "as a separate judgment only."

[No. 14786. *En Banc.* May 7, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Seaborn Shipyards Company, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Respondent.*[1]

FORCIBLE ENTRY AND DETAINER — RELIEF — AMENDMENT OF COMPLAINT. An action for unlawful detainer may not, by amendment of the complaint, be changed, over the defendant's objection by demurrer thereto, to an action for equitable relief; and the court having jurisdiction only by a strict compliance with the statute, has no power to grant injunctive relief.

PROHIBITION—WHEN LIES—TO COURTS. Prohibition lies to prevent a superior court, having jurisdiction only for the purpose of determining issues in unlawful detainer, from granting injunctive relief, under an attempted amendment over defendant's objection.

Application filed in the supreme court April 15, 1918, for a writ of prohibition to prevent the superior court for Pierce county, Clifford, J., from entering a decree. Granted.

Huffer & Hayden, for relator.

Fletcher & Evans, for respondent.

MACKINTOSH, J.—In the city of Tacoma, two adjoining shipyards are being operated, one by the relator, and one by George P. Wright. Wright instituted an action of unlawful detainer, or forcible entry and detainer, against the relator in the superior court for Pierce county, alleging that the relator had entered upon a portion of the Wright premises and had refused to remove therefrom, and praying that the premises be restored to him, and for double damages for the wrongful possession thereof. To this complaint the relator demurred, and subsequently, permission having been obtained, Wright filed in the same action an amended complaint in which he sought to require the

[1]Reported in 172 Pac. 826.

relator to remove certain appliances from the Wright premises and to cease to occupy or use the same. To this amended complaint, the relator demurred, one of the grounds of his demurrer being that the amended complaint did not state facts constituting a cause of action in unlawful detainer or forcible entry and detainer. The demurrer being overruled, the relator answered, and after trial, the court found for Wright, fixed his damages, and announced that it would grant a permanent prohibitory injunction and restraining order requiring the relator to cease doing the things complained of, and requiring him to perform certain affirmative acts. The relator then applied to this court for a writ of prohibition restraining the superior court for Pierce county from making and signing findings and conclusions and entering a decree in conformity with the decision which it announced at the conclusion of the trial.

The question for consideration in this case is: Can a person, having begun an action of unlawful detainer or forcible entry and detainer, subsequently, by filing an amended complaint, change that action over the objection of the defendant, proceed with the new action as an equitable one, and have entered a decree in equity?

The action of unlawful detainer, or forcible entry and detainer, is a special statutory summary proceeding in derogation of the common law, and, to confer jurisdiction upon the court, each step provided by the statute must be strictly complied with. *Big Bend Land Co. v. Huston,* 98 Wash. 640, 168 Pac. 470. The relator having been brought into court under a special summons and compelled to defend against a special proceeding, the court obtained jurisdiction of him for a special purpose only, namely, to determine the issue in an unlawful detainer or forcible entry and detainer

action. The court's jurisdiction of the relator was limited, and after having obtained that limited jurisdiction, the court could not, by amendment, allow the special proceedings to be transformed into a general proceeding, either at law or in equity, the relator at all times objecting to the court proceeding other than to the trial of an unlawful detainer, or forcible entry and detainer, case. The court having jurisdiction only by virtue of a strict compliance with a special statute, was, to all intents and purposes, sitting as a special tribunal, restricted to the determination of a special statutory proceeding, and was not sitting as a court with general legal or equitable jurisdiction, and had no jurisdiction to determine any other issue than that presentable under the special statute. The relator having appeared in the case before the filing of an amended complaint, there was no way in which he could have objected to the court's jurisdiction to try the case as an action in equity, except by such motions and demurrers as appear in this case. There is not involved in this proceeding any question of the waiver of a special appearance, for at no time was there any opportunity for the relator to have specially appeared and objected to the jurisdiction, for this case is unlike the case of *Matson v. Kennecott Mines Co.*, 101 Wash. 12, 171 Pac. 1040, the court here had properly acquired jurisdiction of the relator in a special proceeding, but thereafter attempted to change the nature of the action, and the relator, having appeared generally, could not then remove himself from the case and return by way of a special appearance. This was an action in unlawful detainer, or forcible entry and detainer, because of the allegations in the original complaint, the prayer thereof, and the summons by which the relator was brought into court. As was said in *Jeffries v. Spencer*, 86 Wash. 133, 149 Pac. 651, "the

special summons here employed would be wholly insufficient to confer jurisdiction of the parties in an action of ejectment."

The court never having had jurisdiction of the relator for any purpose other than to determine the issues in an unlawful detainer or forcible entry and detainer action, it follows that the court was without power to proceed in and determine an equitable action and could not grant injunctive relief, hence the writ must issue.

It is so ordered.

CHADWICK, PARKER, FULLERTON, and WEBSTER, JJ., concur.

ELLIS, C. J., took no part.

[No. 14381. Department One. May 8, 1918.]

LIZZIE SMITH *et al.*, *Respondents*, v. GEORGE W. FLETCHER, *Appellant*.[1]

COURTS—JURISDICTION—LANDS IN ANOTHER STATE. The courts of this state have jurisdiction to enter judgment *in personam* in an action to cancel a note and mortgage upon lands in another state, upon the ground of fraud, having acquired jurisdiction of the person of the defendant.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—DUTY TO INSPECT—EVIDENCE—SUFFICIENCY. A contract for the purchase of arid land may be rescinded for fraudulent and material misrepresentations as to the adequacy of a water supply, through a ditch, six miles in length, work on which was under way at the time of plaintiff's inspection, where the facts were peculiarly within the knowledge of the vendor and difficult of ascertainment and the representations were relied upon on that account.

SAME—RESCISSION BY VENDEE—INTEREST. Upon rescission of a contract for the sale of land in another state, judgment granting a cancellation of a note and mortgage for $10,000 given by the plaintiff, properly allows, in the alternative, a money judgment for the total

[1]Reported in 173 Pac. 19, 636.

price paid and the mortgage, with interest on the whole sum from the date of sale; since, if the mortgage is not cancelled, the plaintiff will be liable for interest secured by the mortgage.

APPEAL—DECISION—EXPIRATION OF OPTION. Upon affirming a judgment which granted appellant an option that expired before the hearing on appeal, the affirmance will be with the privilege of exercising the option granted.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered February 27, 1917, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

E. H. Belden (E. C. Hale, of counsel), for appellant.

Berkey & Cowan and *Samuel R. Stern,* for respondents.

FULLERTON, J.—The respondents, in May, 1916, took a conveyance of certain lands in the state of Idaho from George W. Fletcher, a resident of that state. A cash payment of $4,500 was made on the execution of the conveyance, and a promissory note for $10,000 taken for the remainder of the purchase price, secured by mortgage on the land purchased. The deed included certain water rights for the irrigation of the land, comprising a two-ninths' interest in a reservoir and the full ownership of a ditch carrying the water therefrom. In August, 1916, the respondents began an action in the superior court of Spokane county, state of Washington, for the cancellation of their note and mortgage and the recovery of the portion of the purchase price paid on the land, basing their action on the alleged fraudulent representations of the vendor that the reservoir and ditch furnished sufficient water to irrigate the whole tract of 160 acres for the production of hay, grain and fruit and afford a surplus of water for sale to adjacent landowners. Jurisdiction of the person of the appellant, Fletcher, was acquired, and the

cause proceeded to trial before the court without a jury. Findings and conclusions were made and judgment entered in favor of respondents, from which judgment this appeal is prosecuted. Pending the appeal in this court the appellant George W. Fletcher died. Upon proper showing made, his executor was by this court ordered substituted as party appellant.

By demurrer to the complaint in the trial court and by argument here, the appellant raises the objection that the superior court of Spokane county had no jurisdiction of the subject-matter of the action, for the reason that it seeks to subject lands located in another state to the judgment of a court of this state; that any judgment rendered here could not operate extraterritorially, and hence would be ineffective to grant the relief sought by the respondents. There is no claim that the court did not have jurisdiction of the person of the appellant, who was a nonresident of the state. The action brought was the equitable one of rescission on the ground of fraud, praying the cancellation of a note and mortgage given by respondents on the purchase price of land lying in another state and the refund of moneys paid, a deed being tendered reconveying the land from the respondents to the appellant. It did not seek to subject land in a foreign jurisdiction to the judgment of a court of this state, but was merely designed to operate against an individual; in other words, a remedy *in personam* and not one *in rem* was sought.

It is a universal rule that the courts of one state cannot pass judgment on the title to land in another state. But where the action is aimed at the personal relations of parties in connection with property beyond the jurisdiction, it is well recognized that courts may afford relief. This court, in the case of *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054, held that the courts

of this state had jurisdiction to reform a deed to land in another state, and took occasion to review a number of decisions relating to the exercise of jurisdiction incidentally affecting lands in another state. The opinion shows that such jurisdiction has been frequently exercised, where extraterritorial lands were involved, to compel the execution or cancellation of deeds, the specific performance of contracts relating to real property, the reformation of deeds, the enforcement of trusts in real property, the avoiding of a deed and ordering reconveyance of land, and the foreclosure of mortgages without the jurisdiction of the court. The principle upon which courts assert jurisdiction in such cases is stated in *Lindley v. O'Reilly,* 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. 802, 1 L. R. A. 79, in the following language:

"Ever since *Penn v. Lord Baltimore,* 1 Ves. Sr. 444, it has been established law that in cases of contract, trust or fraud, the equity courts of one state or country, having jurisdiction of the parties, are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust or fraudulent title pertains to lands in another state or country. The principle upon which this jurisdiction rests is, that chancery, acting *in personam* and not *in rem,* holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience. If it went beyond that the assumption of jurisdiction would not only be presumptuous but ineffectual. . . . The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment or like process, against the person, and cannot operate *ex proprio vigore* upon lands

in another jurisdiction to create, transfer or vest a title."

See, also, *Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382.

The appellant cites the case of *Olympia Mining & Milling Co. v. Kerns*, 64 Wash. 545, 117 Pac. 260, where this court sustained the conclusion of the trial court refusing to assume jurisdiction on the ground of comity over an action on a contract in which was involved the title to land in Idaho, and relegating the parties to an action within the jurisdiction of the *situs* of the property. While the courts of one state may well refuse to exercise jurisdiction in such cases on the ground of comity, their action in so doing amounts to no more than a matter of discretion. In the case cited, it appeared not only that the action involved the title to land in Idaho, which this court had no jurisdiction to determine, but also that the action did not permit of the rendition by the court of this state of an enforceable judgment *in personam* for damages or any alternative relief. That case in nowise departs from the rule announced in the *Rosenbaum* case, but is a tacit recognition of it.

The decree in the case before us was as follows:

"It is ordered, adjudged and decreed: That plaintiffs recover of the defendant the sum of $4,500 with interest thereon from May 1st, 1916, and that the defendant herein surrender to the plaintiffs that certain note now in his possession, dated May 1st, 1916, in the sum of $10,000, signed by the plaintiffs, and that he deliver to said plaintiffs that certain mortgage given to secure said note, and which said mortgage is now of record in the office of the county recorder of Elmore county, Idaho, and that he execute a satisfaction of said mortgage and deliver the same to the plaintiffs, and that he deliver such note and mortgage and cancellation within thirty days from date hereof, and the

plaintiffs having tendered into court a good and sufficient deed to the property, upon which said mortgage is a lien, and also a deed for the said two-ninths' interest in the said reservoir referred to in the findings herein, if the said defendant shall fail within said thirty days from date hereof to accept said deeds and surrender said note and cancel said mortgage or deliver a satisfaction thereof to these plaintiffs, then that, in addition to the said sum of $4,500 above referred to, judgment be and hereby is rendered against said defendant for the additional sum of $10,000, with interest from May 1st, 1916."

This decree was within the issues, involved no adjudication upon the title to the lands, and merely rendered a personal judgment for the surrender of a note and mortgage, the cancellation or satisfaction of the mortgage, and in the alternative for a money judgment by way of damages. It merely placed the parties *in statu quo* after setting aside a contract based on fraud, and is enforceable against the appellant personally.

The main contention of the appellant is rested upon the insufficiency of the evidence to establish misrepresentation of material matters, and the reliance thereon of the respondents, his claim being that the respondents purchased after an inspection of the lands by their agent, H. C. Lambach.

It appears from the evidence that the lands in Idaho were purchased by the respondent Lizzie Smith, a resident of Iowa, the purchase being consummated by her son-in-law, Lambach, a resident of the state of Washington, who was acting as her agent. Lambach visited the Idaho lands on March 24, 1916. The lands were arid and valueless without irrigation. He expressed himself as satisfied with the lands in case there was a sufficient water right appurtenant for their proper irrigation. The appellant suggested that he inspect the reservoir and ditch that went with the land in

order to satisfy himself on that score. Lambach answered that he was not conversant with irrigation projects, and would have to rely on the appellant's statement in that regard even though he did inspect them. The appellant then represented that he owned a two-ninths' interest in a storage reservoir; that it afforded an ample water supply for the 160 acres whose sale was under contemplation, and for 80 acres of contiguous land owned by appellant's son; that the ditch had recently been cleaned and was in fine shape; and that, by lowering the ditch a couple of feet, enough water would be provided to enable him to sell sufficient to irrigate an additional 1,000 acres.

The ditch leading from the reservoir was six miles in length, and work had already been started to reduce the level of its bed so that the headgate at the reservoir could be lowered two feet, which, the appellant assured him, would afford abundance of water during the whole irrigation season, not only for the lands sold, but for contiguous lands. It appears that the appellant himself had not utilized the reservoir waters for the irrigation of his land, but had merely maintained a slight flow in the ditch for the purpose of preserving his title to its right of way. The appellant had never irrigated in excess of thirty-one acres of land, and it appears that, for that purpose, he had been dependent on sources of supply other than the reservoir waters. After the purchase of the land by the respondents, their tenant attempted to utilize the reservoir, but could not lead the waters to their lands for the reason that the water disappeared through crevices and fissures in the ditch bed where it was constructed over lava rock. There was expert evidence that the reservoir would not supply water to adequately irrigate the respondents' land, and that the ditch could be made dependably

serviceable only at great expense. The respondents went into possession early in the month of May, and on the 24th of that month the reservoir dam burst, allowing three-fourths of the storage waters to escape, and in the latter part of June the ditch broke. The respondents raised satisfactory crops of alfalfa on eighteen acres of their land, and had water for this purpose during the season, but the major portion of the water used came to them by sufferance from another ditch in which they possessed no rights. Their experience with the reservoir and ditch, on which their crops were dependent, having convinced the respondents that the appellant had misrepresented the facts as to the water supply, they promptly, within three and one-half months following their purchase, gave notice of their election to rescind the contract.

We think the finding of the trial court that the representations made by the appellant to the respondents were fraudulent and material is amply sustained by the evidence. The appellant contends, however, that, even if that be granted, the respondents are not entitled to recover, for the reason that their agent was on the ground and in a position to inspect the irrigation facilities and was urged by the appellant to do so. On that assumption he argues that, having had full opportunity to investigate the truth of the representations, he purchased at his own peril. But this court, in a line of cases extending from its earliest history down to the recent case of *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656, has adhered to the rule that, where facts are peculiarly within the knowledge of the vendor and difficult of ascertainment by the vendee, the vendee who relies on the vendor's word is entitled to rescind for misrepresentation as to material facts, although he may have inspected the land and made some

investigation of the subject-matter of the representations.

In *Eyers v. Burbank Co.*, we said:

"It is true the evidence shows that respondent spent the greater part of two days, when he first visited the land in September, examining it and its surroundings; but his testimony is to the effect that he did not know anything about farming by irrigation; . . . We think, under such circumstances, the representations made were material and that the respondent had a right to rely upon them. Even if some examination is made by the purchaser but not a thorough and complete examination, the vendor is not always allowed to receive and retain the benefit derived from a fraudulent misrepresentation relied upon by the injured party. Respondent was wholly ignorant of the peculiar and artificial processes of cultivation by irrigation, its methods and results, and of the soil."

In *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55, we said:

"Where the purchaser may know the truth by looking, or where the truth is shown him, he is not misled, but where he relies upon the statements of the vendor, and has no knowledge that such statements are false, he can, when they are false, and he had been reasonably prudent, recover damages. If no knowledge of their falsity is presented to him, the purchaser may rely implicitly upon the statements of the vendor, if such statements are not so openly and palpably false that their untruth is apparent to an ordinarily prudent person."

The appellant contends that the trial court erred in its allowance of interest. The purchase price of the land was $14,500, for which the respondents gave $4,500 cash and their note for $10,000. The court directed that appellant repay the $4,500 and surrender and cancel the note and mortgage for $10,000, and, in case of default, that the respondents have a money judgment

for $14,500, with interest at six per cent from the date of sale. The objection made is that, as to the $10,000 note, the respondents had never been deprived of the use of the actual cash represented by it, and hence have never suffered damage to that extent. The decree was an equitable one directing appellant to return the promissory note, and, in case of refusal, awarding judgment for its face value, with interest. In case of its nonreturn and possible negotiation, the respondents might be subjected to liability upon it, thereby suffering damages to the extent of the principal and interest of the note. The alternative judgment was proper, and, under our statute (Rem. Code, § 457), the prevailing party was entitled to interest on the judgment.

The decree and judgment of the trial court is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

ON PETITION FOR REHEARING.

[Decided June 24, 1918.]

PER CURIAM.—The appellant asks a rehearing in the foregoing cause, or, in the alternative, for a modification of the decree of affirmance as ordered by this court. On the main issue, after a careful consideration of the petition, the court is satisfied with the conclusion reached, and declines to enter upon a further consideration of the merits of the cause.

The decree of the lower court gave the appellant an option to submit to a judgment for the face value of the note and mortgage under consideration, or to return them for cancellation and delivery within thirty days after the date of the decree. The appellant suggests that, since this limitation has expired pending the appeal, he may be denied the right to exercise the option granted him in the decree because of the order

of this court for affirmance without reservation of the right, and he asks, unless the intention of the court was otherwise, that he be granted a limited period after the return of the remittitur in which to exercise the option. It was not the intention of this court in directing an affirmance to deny to the appellant the benefit of the option, and to the end that there may be no question concerning it, the order of affirmance will be so far modified as to allow the appellant thirty days after the remittitur reaches the trial court in which to exercise any or all of the privileges granted him by the decree of that court.

Let the remittitur go accordingly.

[No. 14416. Department One. May 8, 1918.]

VIRGINIA A. CLARK, *Appellant*, v. THE CITY OF SEATTLE, *Respondent.*

VIRGINIA A. CLARK, *a Minor, Appellant*, v. THE CITY OF SEATTLE, *Respondent.*[1]

MUNICIPAL CORPORATIONS — TORTS — MAINTENANCE OF NUISANCE — EVIDENCE—SUFFICIENCY. Where a wading pool in city playgrounds was cleaned and drained each Friday, the fact that a broken bottle was found therein on Sunday is not sufficient to charge the city with maintaining a nuisance or render it liable for injuries sustained by a child, cut by the broken glass, there being no evidence of notice of the glass, either actual or constructive.

Appeal from a judgment of the superior court for King county, Bell, J., entered May 4, 1917, upon granting a nonsuit, dismissing consolidated actions for personal injuries. Affirmed.

Vanderveer & Cummings, for appellants.

Hugh M. Caldwell and *Frank S. Griffith*, for respondent.

[1]Reported in 172 Pac. 1155.

MAIN, J.—This is an appeal from a judgment dismissing two actions which had been consolidated for the purpose of trial. One action was brought on behalf of a child who had sustained a personal injury, the other by the mother of the child for the loss and expense which she had sustained by reason of the injury to the child.

In one of the public parks of the respondent city there was constructed and maintained what is known as the Lincoln Playfield. In this playfield had been constructed a cement wading pool, the water in which at its deepest place was about one foot. In this pool children were accustomed, during the warm weather, to wade for recreation and amusement. On the 27th day of August, 1916, Virginia A. Clark, a child then about the age of ten or eleven years, while wading in the pool, cut her foot on a broken glass bottle. How the bottle got into the pool is not known. After the injury, there was taken from the pool a small glass bottle which was broken in two pieces.

At the conclusion of the evidence offered in support of the recovery, the city challenged the sufficiency thereof and moved the court for a judgment of dismissal. This motion was sustained, and from the judgment dismissing the actions, the appeal is prosecuted.

The appellants recognize the rule of nonliability of the city, while acting in a governmental capacity, for the tortious acts or omissions of its agents, as stated in *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895, and *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792; but it is claimed that the facts in the present case show that the city was guilty of maintaining a nuisance, and for this reason, the rule stated in the cases referred

to does not apply. For the purposes of this case only it will be assumed, but not decided, that the city, even though acting in a governmental capacity, would still be liable for the maintenance of a nuisance to a person who sustained injury thereby. The evidence shows that the wading pool was drained and cleaned on Friday of each week. The accident in the present case occurred on Sunday. If the pool was drained and cleaned on the Friday previous, the fact that some thoughtless person may have cast into the pool a broken bottle between that time and the time of the injury would not be sufficient to charge the city with maintaining a nuisance. There is no evidence that either the city or the park board, under whose control the playfield was operated, had any notice, actual or constructive, that the pool contained broken glass prior to the accident.

The judgment will be affirmed.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ., concur.

[No. 14435. Department Two. May 8, 1918.]

S. W. CROOKS, *Appellant*, v. STEVENS COUNTY, *Respondent*.[1]

HIGHWAYS—INJURIES—CONTRIBUTORY NEGLIGENCE—APPARENT DANGERS—EVIDENCE—SUFFICIENCY. Plaintiff, injured in the overturning of his load of hay, cannot recover from the county, where it appears that the accident happened through his manner of loading and driving, rather than to the fact that there was a dangerous grade and a rock in the road, and the hay and rack would not have slipped off if the wheels had been kept in the ordinary tracks, and the dangers were open and apparent.

Appeal from a judgment of the superior court for Stevens county, Ronald, J., entered June 30, 1917, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through defects in a county road. Affirmed.

Roche & Onstine and *R. A. Thayer*, for appellant.

L. B. Donley and *L. C. Jesseph*, for respondent.

MOUNT, J. — This action was brought to recover damages for personal injuries which the plaintiff received by the overturning of a load of hay upon which he was riding while driving over one of the public roads of Stevens county. The case was tried to the court and a jury. At the close of the plaintiff's case, the defendant moved the court for a directed verdict. The trial court apparently had no doubt that he should grant this motion, but stated in substance that, in order to avoid another trial in case he was in error, he would hear all the evidence and submit the case to the jury and later enter such judgment as in his opinion was proper. After the close of the defendant's evidence,

[1]Reported in 172 Pac. 1158.

the motion was renewed and denied. The case was submitted to a jury, and resulted in a verdict of $3,000 in favor of the plaintiff. Thereupon the trial court granted a judgment in favor of the defendant notwithstanding the verdict. The plaintiff has appealed from that judgment.

The facts are as follows: Prior to the 28th day of October, 1914, Stevens county had constructed a road from the town of Orient down a hill leading to a bridge across the Kettle river. This road was constructed upon a hillside. At the point where the appellant was injured, different witnesses placed the width of this road at from six feet, ten inches, to eight feet. At this point the road was blasted out of solid rock, so that there was an embankment about five feet high on the upper side, and the lower side was somewhat above the slope of the hill. At this point the road was somewhat rough because of the rocky condition. There was also a slight turn in the road at this point. It is contended by the appellant that a large rock sloped down from the embankment on the upper side of the road to or into the traveled way. There is some dispute upon this particular question. On the date named, the appellant went over this road for a load of hay. After going over the road, he loaded the loose hay upon his wagon and started back to his home. He was familiar with the road, having been over it a number of times. Being asked to describe the event, he testified as follows:

"Well, I started down this grade. When I came to the top of the grade I got out to see that everything was all right, the wagon was all right, the hay was seemingly in the proper position, the rack sat solid on the wagon. I got out to see to this before I started down this grade, to be sure that everything was all right. I examined to see that all these things were just so. I knew it was a dangerous road. I took particular pains to have the lines just so in my hands, and

the brake rope, so I started down. I held the lines in one hand and the brake rope in the other, possibly at times I held both together, but most all of the time I had one hand holding the lines and the other the brake rope. The team was a gentle team and everything was all right, there was no unusual thing happened that I know of . . .

"I came down to the place, right to the place where this accident happened. I knew that it was rough right at that point. I knew there were several rocks there but just exactly where this particular rock was I didn't know. I didn't know there was such a big rock as that one, but I knew there was rocks there because going up that road I could experience more or less of the roughness, so coming down I knew, that being so, that I would have to be very careful in going over that part of the road, the road being so narrow and all of those rocks there, so I drove the team very carefully and I came right down to this rock, I could feel several bumps there right around where this accident happened. I came down a little further and I could feel more bumps, and as I came around this angle the front wheel I could feel took an unusual jar, and as I went over it I knew I had scraped across over one of those big rocks, so immediately as soon as I crossed over that—I was holding onto the lines, holding the team as best I could, as good as any teamster could do, when the horses, being pressed by the load, and maybe being a little nervous and when the hay bumped into them they give a quick step, and immediately after that the hind wheel, I could feel it take a great bump, which was right over that rock, and when it struck the rock the load of hay and the rack went right over and, of course, I went right over with it—the rack and the hay and I went over the embankment and I was thrown a little in front of the hay so that I escaped being buried . . ."

This is the explanation which the appellant himself gives of the accident and how it occurred. He was the only eyewitness to the accident. The wagon did not turn over. The hay and the rack upon the wagon fell

from the wagon. The wagon and the team remained upon the road. Other witnesses testified that, at this particular point, a ledge of rock sloped and extended from the bank down near the wheel tracks. There was a slight curve in the road at this point, and the appellant, while coming down the grade and attempting, no doubt, to hold the load in close to the bank at the upper side, turned his front wheel against this sloping ledge of rock. The rear wheel struck the rock where it was somewhere between twelve and fifteen inches high, and in that way the load and the appellant were thrown from the wagon.

It is argued by the appellant that the road was not a reasonably safe road by reason of this rock, and by reason of the fact that the road was on a grade, and by reason of the fact that the road was narrow. A number of cases are cited to the effect that it was error of the trial court to grant a judgment notwithstanding the verdict, because the court may not say that there was neither evidence nor reasonable inference from evidence to sustain the verdict. While it is true the evidence shows that the road was narrow and rocky at the point where this accident occurred, the evidence clearly shows that the road was reasonably safe for ordinary travel, and that, if the appellant had kept his wagon in the tracks where wagons were accustomed to go at that particular point, the accident would not have happened. The accident was caused solely by the appellant's veering from the beaten way to the side of the road and striking against the ledge of rock in the bank on the upper side. The hind wheel of the wagon struck this rock at a height of from twelve to fifteen inches, which was sufficient to, and no doubt did, cause the load of hay upon the wagon to be thrown from the road. The appellant was familiar with the character of the road, he knew that it was narrow, he knew that

it was rough at this particular place, and he knew that it was on a hill. Whatever dangers there were, were open and apparent to him, and it was his duty, under these circumstances, to follow the beaten track and not to veer therefrom so as to run his wagon against the embankment or a rock which was located therein. It is common knowledge that in a mountainous country the roads are frequently graded out of hillsides through rocky cuts and are narrow of necessity. Counties are not insurers of the safety of such roads for loads such as the appellant was carrying. As we said in *Culley v. King County*, 101 Wash. 38, 171 Pac. 1034, in quoting from *Leber v. King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267:

" 'We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones.' "

It is plain from a reading of the whole evidence in the case that the road at the point in question was reasonably safe for ordinary travel, that the load of loose hay piled high was not ordinary travel, and that, if the appellant had kept his wagon in the tracks which were worn upon the road at this particular point and had not deviated so as to run his wagon against the bank upon which the rock was located the accident

would not have happened. In short, while the appellant undertakes to testify that he was careful in every respect in examining his wagon and his load and in handling his team, it is plain that the cause of the accident was his own negligence in carrying the character of load he did and in veering from the road and striking the rock, causing the wagon to throw the load and injure him. We are satisfied that there was neither evidence nor inference which could properly be drawn from the evidence to sustain the verdict.

The judgment is therefore affirmed.

ELLIS, C. J., PARKER, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14503. Department Two. May 8, 1918.]

LIZZIE FRENCH, *Respondent*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE—SNOW AND ICE ON PLATFORM—EVIDENCE—QUESTION FOR JURY. The negligence of a street car company is a question for the jury, in an action by a passenger, injured in a fall on alighting from an icy platform, where there was evidence that snow and ice was allowed to accumulate on the platform, and there was some evidence that it had not been cleared off at the end of the run.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 5, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

Graves, Kizer & Graves, for appellant.

Robertson & Miller and *Mulligan & Bardsley*, for respondent.

[1]Reported in 172 Pac. 1159.

MOUNT, J.—Action for personal injuries. Plaintiff, in her complaint, alleged that, on February 1, 1916, she became a passenger on one of defendant's street cars in the city of Spokane, and that, when she left the car at her destination, she slipped and fell upon ice which had accumulated upon the platform of the car, thereby receiving serious injuries. Defendant, for answer to the complaint, admitted that the plaintiff was a passenger on one of its cars at the time alleged, and that she fell while leaving the car; but denied all other allegations of the complaint. Contributory negligence was pleaded as an affirmative defense. Upon these issues the case was tried to the court and a jury. At the close of the plaintiff's evidence, and again at the conclusion of all the evidence, defendant moved the court for a directed verdict. These motions were denied, and the jury returned a verdict in favor of the plaintiff for $600. Thereafter the defendant moved for judgment notwithstanding the verdict. This motion was denied. Judgment was entered upon the verdict. The defendant has appealed.

The only question made upon this appeal is whether the evidence is sufficient to sustain a recovery. The respondent testified that she left her home, in the south side residence district of Spokane, at about 7:30 o'clock, p. m. of February 1, 1916, to visit a friend on the north side of the city. She started to return home between 9:30 and 10 o'clock, taking a car on one of the appellant's lines to a junction point at Olive and Madelia streets in the northeastern part of the city. There she changed to a car of another of its lines. This car had come from the end of the line at Sprague and Freya streets, a distance of about twenty blocks from Olive and Madelia streets. The car continued on its run into the downtown business district, through that, and out into the south side residence district. It

reached the respondent's destination, Second and Sherman streets, at about 10:45 o'clock, p. m. The run from Olive and Madelia streets to that point had taken about forty-five minutes. The conductor's trip report showed that twenty-seven passengers got on the car between the end of the line and Second and Sherman streets, nearly all of them during the passage through the business district. When the respondent was attempting to leave the car, after she passed from the inclosed portion through the door and onto the rear platform of the car, she slipped and fell, receiving injuries for which the recovery was had.

It is not claimed that the appellant was in any other way negligent than that it permitted snow and ice to accumulate on the platform. Respondent testified that, when she boarded the car, she noticed snow and ice on the platform above the steps leading thereto from the ground. She testified that the snow and ice looked as if it had been tracked in by people coming in; that it was where traffic would come in and out of the steps into the door; that there was snow on the ground, but that it did not snow from the time she left home, about 7:30 o'clock, until after she returned that evening; that somewhere between 5 and 7 o'clock there had been some snow; and that there was about an inch of fresh snow on the ground. There was dispute in the evidence as to whether it snowed that day between the hours of 7 and 10:45 o'clock. The conductor who was on the car at the time of the accident testified that he cleaned the snow from the car at the end of his run. Counsel for appellant argues that there was no negligence shown on the part of the company, and that the evidence shows that the snow and ice which had accumulated upon the platform accumulated upon that particular trip. Appellant relies principally upon the case of *Caywood v. Seattle Electric Co.*, 59 Wash. 566,

110 Pac. 420. That was a case where the jury had found in favor of the defendant. In that case it was alleged that snow and ice existed on the steps of the car and in the entrance way at the time the appellant fell from the car. We said in that case:

"Nor was there any evidence tending to show that it (meaning the snow and ice) had existed there for any considerable length of time. On the contrary, the evidence that does touch the question is the other way. The appellant himself testified that when he boarded the car in the down town district he saw no snow or ice either on the steps of the car or in entrance way, and thinks there was none. Such snow and ice as had accumulated in these places, therefore, must have accumulated during the passage of the car from the place where the appellant boarded it to the place where he fell therefrom, and as but a trace of snow fell during that trip, the ice and snow must have been brought in by the feet of the passengers who boarded the car between those points. But the fact that some snow and ice may have accumulated by this means is not evidence of negligence on the part of the company. It is not practicable to prevent such a condition when there is snow falling or there is snow upon the ground."

We think that case is distinguishable from this by reason of the fact that, when respondent boarded the car, she saw snow and ice had accumulated upon the platform. She also testified that snow had not fallen between the hours of 7:30 and 10:45, the time she was injured. The fact that snow and ice had formed upon the back platform of the car was, at least, some evidence of the fact that the snow was not cleared from the platform at the end of the trip, because ice will not ordinarily form from snow which is freshly tracked upon the car. Whether the company was negligent in permitting snow and ice to accumulate upon the platform of the car, under the evidence offered by the respondent, we think was a question for the jury. It is

no doubt true, as stated in *Caywood v. Seattle Electric Co., supra,* that some snow and ice may necessarily accumulate upon the steps of a street car when there is fresh snow upon the ground; and it is probably true that, in running a distance measured by forty-five minutes in time, the wheels of the car might throw some snow upon the steps; but in this case there was snow above the steps, on the platform, which was some distance above the wheels. It is improbable that the wheels of the car had anything to do with putting the snow there. The snow which was upon the platform was no doubt carried there by passengers entering the car. The ice was evidently the result of snow which had accumulated previously. It is quite unlikely that a dangerous quantity of snow would be carried there by the number of passengers who entered the car that evening between the time the respondent entered the car and the time she fell. Whether the snow and ice was so carried or whether it was permitted to remain after the end of the run, were questions which the jury were competent to decide; and if they found that the conductor did not properly clear the car of snow and ice at the end of the run, they were justified, we think, in finding that the company was negligent. We are satisfied that the case is not controlled by the *Caywood* case, and that there was sufficient evidence upon the question of appellant's negligence to go to the jury.

The judgment is therefore affirmed.

ELLIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14550. Department One. May 8, 1918.]

JOHN WILBUR HARTFORD, *Respondent*, v. M. S. STOUT *et al.*, *Appellants*.[1]

JUDGMENT—VACATION—GROUNDS—MISTAKE OF CLERK. A judgment may be vacated for the mistake, neglect or omission of the clerk, in entering findings and judgment, contrary to the directions of the judge to hold them, after they were signed and given to the clerk.

SAME — VACATION — NOTICE — WAIVER. A voluntary appearance without objection to trial of the merits of the motion waives notice of proceedings to vacate a judgment required by Rem. Code, § 468.

APPEAL—REVIEW—RECORD. A recital in a bill of exceptions of an appearance is sufficient to show the appearance, although the judgment does not contain such a recital.

APPEAL—REVIEW—OBJECTIONS. Objection to want of formality in proceedings to vacate a judgment must be made below and preserved in the record, in order to be reviewed on appeal.

REPLEVIN — OWNERSHIP OF AUTOMOBILE — EVIDENCE—SUFFICIENCY. In an action of replevin of an automobile, purchased in the name of a father, the evidence sufficiently shows that it was in fact owned by his son, where it appears that he paid for it, and for the state license fee, insurance, and costs of maintenance, and that the title was taken in his father's name for the sake of convenience only.

ESTOPPEL—TITLE TO PROPERTY—OSTENSIBLE OWNERSHIP. A son purchasing an automobile in his father's name is not estopped by that fact to assert title, as against a judgment creditor of his father, purchasing at execution sale; since such judgment creditor is not an innocent purchaser for value, and can assert only the title which the judgment debtor had.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 31, 1917, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

L. H. Brown, for appellants.

W. B. Mitchell, for respondent.

[1]Reported in 172 Pac. 1168.

FULLERTON, J.—The respondent, John W. Hartford, as plaintiff, brought this action in replevin to recover as his own property an automobile seized by the sheriff under an execution issued upon a judgment in an action in which M. S. Stout was plaintiff and William T. Hartford, father of the respondent, was defendant. Issue was taken on the complaint and a trial had before the court sitting without a jury. At the conclusion of the trial, the court filed a written memorandum announcing his conclusion upon the evidence and the law applicable thereto, and directed counsel for the defendants, the conclusions being in his clients' favor, to prepare formal findings of fact, conclusions of law, and a judgment in conformity therewith. In his memorandum decision the trial judge did not find that the plaintiff was not the actual owner of the automobile, but intimated that his conclusion on the facts was to the contrary, resting the judgment on the ground that the plaintiff was estopped to claim title, since, as he recited in his written opinion, the plaintiff, in order to maintain his claim of title, had to prove a violation on his part of a positive mandatory statute. Findings of fact, conclusions of law, and a judgment were prepared by counsel and submitted to the court for signing. These complied with the judge's memorandum, save as to his conclusions on the facts. Instead of a finding showing an estoppel on the part of the plaintiff to claim title, it was found that plaintiff had no title. The court nevertheless signed the papers and handed them to counsel to be filed with the entry clerk. No sooner had counsel left the court room, however, than it occurred to the judge that he had probably been mistaken as to the order of the proofs; that is, whether the plaintiff had himself introduced evidence tending to show his violation of the statute, or whether such evidence had been introduced by the defendant to dis-

credit the plaintiff as a witness. The judge thereupon directed the clerk in attendance upon his department to notify the entry clerk not to enter the judgment signed, but to hold it in abeyance until he received further directions. The court then sent for the counsel of the respective parties, notified them of his probable mistake, and intimated to them that, if he had been mistaken, judgment should go for the other side. Counsel were not able to agree as to the order of the proofs, whereupon the court announced that he would have the evidence read to him from the stenographer's notes and inform them of his conclusion later. Afterwards the judge ascertained that he had been mistaken in regard to the evidence, and announced to counsel that he was then of the opinion that the plaintiff was entitled to a judgment. It was then discovered that the clerk, whom the judge had instructed to have the judgment held in abeyance, had neglected to so inform the entry clerk, and that the judgment had actually been entered. When this fact was disclosed, the judge informed counsel for the plaintiff that he doubted his power to vacate or set aside the judgment on his own motion, but that he would entertain a petition to vacate it under the provisions of the statute relating to the vacation of judgments entered by mistake, neglect, or omissions of the clerk. A petition for vacation was filed, setting up this ground, and a notice served upon the defendants that it would be called up for hearing on a day certain, some three days after the service of the petition and notice. The petition was heard on the day appointed, and an order entered vacating the judgment. Later on, new findings of fact and conclusions of law were signed by the judge, and a judgment entered allowing a recovery by the plaintiff. The defendants appeal from the judgment so entered.

The appellants first question the sufficiency of the procedure by which the original judgment entered was vacated. If we have correctly gathered the grounds of the contention, it naturally divides itself into two parts, first, that the causes set forth in the petition for the vacation of the judgment are not causes for which a judgment may be vacated under the statute; and second, that the procedure followed was not sufficient to give the court jurisdiction over the person of the several judgment creditors.

In the argument in support of the first of these objections it is not contended, of course, that mistakes, neglect, or omission of the clerk are not grounds provided by statute for the vacation of a judgment, but it is contended that the neglect of the clerk shown in this instance is not the neglect contemplated by the statute. It is said that the mistake, if a mistake at all, was the mistake of the judge; that, after signing the judgment, he concluded he had drawn an erroneous legal conclusion from the facts, and sought to correct it after the cause had passed from his jurisdiction; that the order given by him to the clerk was one beyond his power to give, and hence it was not a mistake, neglect, or omission of the clerk for which any legal right arises, even if the clerk did not give heed to the order. This suggests an inquiry as to the point of time when the trial judge so far loses control over a proceeding tried before him that he may not arrest the proceeding on his own motion. We have held that point of time to be when the judgment is rendered and entered. Here we think the judge had not lost that control when he gave the order to the clerk. The judgment had not then been entered. True, the judge had signed a formal order for a judgment, but the order was nothing more than a direction to enter the judgment, as much within his control as it would have been had he merely out-

lined his conclusions orally and directed the clerk to prepare and record a written entry in accordance therewith. It was, therefore, a neglect or omission of the clerk to enter the signed order after the judge had directed him to withhold its entry; a neglect or omission authorizing the litigant injuriously affected to petition for its vacation.

The claim of want of jurisdiction of the persons of the judgment creditors is founded on the fact that the notice served with the petition required them to appear within three days after the service, whereas the statute governing the procedure (Rem. Code, § 468), provides that the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, as in an original action by ordinary proceedings; which means in the present case that they should have been given twenty days in which to appear. But the statute also provides that the proceedings shall be governed, with certain specified exceptions, by the rules governing ordinary actions, and it is not necessary in an ordinary action that a summons be issued and served in order to obtain jurisdiction of the person of the defendant. The defendant may waive the issuance of the summons by appearing voluntarily, either in person or by an authorized attorney, and a judgment entered after such an appearance is neither void nor voidable for want of jurisdiction over the person. In this instance the defendants did appear at the time appointed and contest the application upon its merits without suggesting want of proper service of summons upon them. We have not overlooked counsel's contention that the record fails to show an appearance by them. It is true the formal order vacating the judgment does not so recite, but it so appears in the bill of exceptions upon which we are asked to review the order. This recites that the de-

fendants appeared by their attorney and made objections to the hearing of the application upon other grounds, but not upon the ground now under consideration. Since the appellants, in order to procure a reversal, must show error, it is probably not necessary that the record recite an appearance, on the principle that regularity in the orders and judgments of courts of superior and general jurisdiction is presumed unless the contrary affirmatively appears. But if recital be necessary, the recital in the bill of exceptions is sufficient.

Counsel, in his brief, after calling attention to the shortness of the time in which his clients were required to appear, and to the fact that they filed no formal pleadings, says this:

"From this it will be apparent that respondents were given no opportunity to plead or prepare to meet the allegations of the petition, not even to have a demurrer heard. All counsel could do was to object and remain in a belligerent attitude."

But belligerency is all that is required of the defendant in such a proceeding. The code (*supra*) requires no formal pleadings. All he needs to do is to make his objections and see that they are properly preserved in the final record. It is not here held that the objections now made cannot be reviewed because of want of formality in presenting them. It is held that they came too late; that they should have been urged when the cause came on for hearing, and, not being then urged, were waived.

On the merits of the controversy, we think the evidence clearly establishes that the automobile was the property of the plaintiff and not the property of his father, the judgment debtor in the writ under which the car was seized. While it was shown that the title to the car when purchased was taken in the name of

the father, that the state license was taken and the car insured in his name, and that he executed a mortgage upon it to procure a part of the purchase price, yet it was shown that these things were done for reasons satisfactory to the father and son, and that, as between them, the car was the property of the son. It was shown, moreover, that the son paid from his own funds all of the purchase price of the car not procured by the mortgage, and that he paid the state license fee, the insurance premium, the costs of the upkeep and operating expenses of the car, and the installments coming due on the mortgage prior to its seizure. These facts, we think, are sufficient to show that the plaintiff was the actual owner of the car, and the real question is whether he is estopped to set up ownership as against the judgment creditor of his father after permitting his father to appear as the ostensible owner. We cannot conclude that he is so estopped. He is undoubtedly estopped from asserting title as against his father's mortgagee, and it may be that he would be estopped from asserting title as against an innocent purchaser for value from his father, and it may be also, as the appellants contend, that he has made false assertions and false affidavits concerning the title to the property; but it does not follow because of this that he may not assert title as against his father's judgment creditors. A judgment creditor, under our practice, can never become an innocent purchaser of property sold under his writ of execution. He takes only the title of his judgment debtor, and if the judgment debtor has no title, he takes none. For the other wrongs mentioned he must answer to the state or to the party wronged; their commission confers no right on others to seize his property.

The judgment of the court was for a return of the property, or if return thereof could not be had, then

judgment for its value in the sum of $400. It is complained that the judgment for value is too large. It is true the witnesses differed as to the value of the car, but the value found is well within the proofs and we see no cause for disturbing it.

The other errors assigned are met by the view we have taken of the principal questions discussed and require no separate notice.

The judgment is affirmed.

ELLIS, C. J., PARKER, WEBSTER, and MAIN, JJ., concur.

[No. 14586. Department Two. May 8, 1918.]

MARTIN WOLDSON, *Respondent*, v. RICHMOND MINING, MILLING & REDUCING COMPANY, *Appellant*.[1]

CORPORATIONS—STOCK—OPTIONS—CONSTRUCTION. An option to buy 100,000 shares of mining stock, to be taken and paid for in such sums and amounts as may be required in the development of the company's mine, without any limit as to time, was terminated when the mine by a discovery and shipment of ore became profitable and needed nothing for its development.

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered September 19, 1917, upon findings in favor of the plaintiff, in an action for specific performance, tried to the court. Reversed.

Merritt, Lantry & Merritt and *Graves, Kizer & Graves*, for appellant.

Voorhees & Canfield, for respondent.

PARKER, J.—The plaintiff, Woldson, commenced this action in the superior court for Spokane county, seeking specific performance of a contract entered into with

[1]Reported in 172 Pac. 1162.

the defendant company for the sale to him by it of 100,000 shares of its treasury stock at ten cents per share. Trial upon the merits resulted in findings and judgment in favor of the plaintiff, awarding him damages in the sum of $15,000 against the defendant, the trial court being of the opinion that, while he was entitled to recovery, he was entitled to damages only, measured by the difference between the contract and market value of the stock at the time he was entitled under the contract, as viewed by the court, to have the sale thereof consummated. From this disposition of the cause, the defendant company has appealed to this court, contending that the plaintiff is not entitled to any recovery, either by way of specific performance or damages. The plaintiff also has appealed to this court, contending that he is entitled to a more favorable judgment, but since we conclude he cannot have any recovery, we shall refer to him as respondent, and to the defendant mining company as appellant.

Appellant is a corporation organized and existing under the laws of the state of Washington, having its principal place of business in Spokane. In August, 1916, appellant owned and was engaged in developing and operating its mine known as "The Richmond Mine," which mine, it may be assumed, it has continued to own and operate ever since. On August 15, 1916, appellant had in its treasury some 300,000 shares of its capital stock which it was holding in trust for its stockholders. This stock was placed at the disposal of the officers of the corporation with a view to selling it as might become necessary to raise funds to defray the cost of the development of the mine. A by-law of the company authorized its board of directors to sell this stock as in their judgment the best interests of the company might require, at not less than ten cents per share. On August 15, 1916, the company had developed

its mine to a considerable extent. While its development work up to that time had uncovered some ore of some apparent value, the policy of the company had been to prosecute development work rather than attempt to mine and market the ore already uncovered. The company was then indebted about $3,000 for development work. On that day, at a meeting of the board of directors of the company, the following proceedings were had:

"The matter of financing the further development of the company's property was discussed, and on motion it was resolved.

"Resolved, That an option on one hundred thousand shares of the treasury stock of the company be given to Martin Woldson at the rate of ten cents per share, to be taken and paid for in such sums and amounts as may be required in the prosecution of the work of the development of the company's property, Martin Woldson to have the right to throw up said option at any time on reasonable notice so as not to leave this company in debt for any work contracted. Stock to be issued as each payment is made at the rate of ten cents per share."

At that time respondent was a member of the board, and was also the president of the company. This resolution was adopted, however, by the vote of the other members of the board and without the necessity of respondent's vote, in so far as its lawful adoption was concerned. This was done, however, in response to an offer made by respondent to purchase 100,000 shares at ten cents per share to further the development work of the mine and to complete such purchase from time to time as stated in the resolution. Respondent thereupon orally agreed to the terms of the resolution as evidencing a contract between himself and the company. Immediately thereafter the respondent became the general manager of the company and its affairs,

as well as its president, having in charge the operation and development of the mine.

About two weeks following the entering into of this contract, work was done in the mine rendering it evident that there was valuable ore uncovered such as would be profitable to mine and market. Thereupon, instead of pursuing development work, respondent caused the work to be changed to that of mining, shipping and marketing the ore. This was pursued under respondent's management of the mine with such success that the indebtedness owing at the time of entering into contract with respondent was paid off, together with all indebtedness incurred in the mining and marketing of ore, all of which was paid wholly from the proceeds of the ore so mined. It thereupon became apparent that no money was needed from other sources in order to make the mine a profitable working mine. At the beginning of September, 1916, this condition of the mine became so apparent that the market value of the shares of stock of the company was at least twenty-five cents per share, and a short time thereafter increased very much more in market value. About this time respondent ceased to be president and manager of the company, and thereafter, on December 6, 1916, respondent tendered to the company $10,000 as the purchase price of the sale to him of the stock mentioned in the contract evidenced by the resolution of August 15, 1916, and demanded the delivery of the whole of the 100,000 shares of stock, then claiming the right thereto under that contract. This demand the officers of the company refused to comply with, the board adopting a resolution in effect declaring that it was under no further obligation under the contract made with respondent on August 15, 1916. Up to that time neither the corporation nor any one representing it ever made any demand upon respondent to complete

the purchase of any portion of the stock so that the money could be used "in the prosecution of the work of development of the company's property"; nor, up to that time, did the respondent, though the president and manager of the company at all times since the making of the contract of August 15, 1916, ever tender or even suggest to the other officers of the company that he receive any portion of the 100,000 shares of stock and pay therefor, or that the money was needed for the development of the mine. Indeed, the very management of the mine by respondent himself demonstrated that no money was ever "required in the prosecution of the work of the development of the company's property" in order to make it a profitable working mine. On December 6, 1916, all of the debts and obligations of the company were paid, it had a substantial bank balance, and its mine was being profitably worked without the aid of funds other than was being produced by the mining and marketing of the ore taken therefrom. The words "development of the company's property," as used in the resolution and contract of August 15, 1916, we think plainly have reference to this particular mine. These facts, we think, are proven by the evidence all but conclusively; indeed, they are, for the most part, admitted.

This, it seems to us, is one of those cases which finds its correct determination in a plain statement of its controlling facts and has little need of argument to demonstrate what the rights of the parties are in the premises. This was not a contract for an outright, unconditional sale of stock by the company to respondent, but it was plainly a conditional sale to be consummated in part or in whole as the need for raising funds to prosecute the development of its mine might arise; nor was it an option open to acceptance by the respondent for an unlimited time in the future, though there

was no specified time for the consummation of the sale. It seems to us unnecessary to look beyond the plain terms of the contract and the conditions attending its making to render it plain that the need for the money to be derived from the purchase price of the stock was to be the controlling fact determinative of what amount, if any, of the hundred thousand shares of stock should ultimately be sold to respondent. Respondent himself, by his own actions in the management of the mine and the company's affairs, so construed and acted upon the contract up until the time for the need of the money for the purposes contemplated had wholly ceased. Looking to the contract and all the surrounding circumstances, nothing could seem plainer than that there was no intent that the contract should have any binding force upon either the respondent or appellant after the mine should become a profitable working mine. Respondent not having sought to consummate the purchase of any portion of the stock under the contract until after the mine had become a profitable working mine and the need for the money for development work from that source had ceased, we are of the opinion that respondent cannot now have either specific performance of the contract or damages. Suppose the mine had suddenly, following the making of the contract, yielded ore worth millions, as sometimes happens in the mining world, and the need of development money from the purchase price of the sale of stock under respondent's contract had thereby ceased, is it possible that respondent could thereafter enforce the contract and acquire the stock at the nominal price therein specified? The mere asking of such a question gives its own answer contrary to respondent's contentions; yet the principle here controlling is the same as in the supposed case. It is sug-

gested that the contract with respondent for the purchase of the stock was, in effect, a loaning of his credit to the company enabling it to proceed with the work of development. Plainly, we think, the contract had no such effect. There is no evidence that any workman or creditor ever contracted with the company relying upon or even having knowledge of this contract.

The judgment is reversed and the action dismissed. Appellant mining company shall recover costs in this court.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14622. Department One. May 8, 1918.]

In the Matter of the Estate of ROBERTA L. CORNETT. WILLIAM H. CORNETT *et al., Plaintiffs,* v. J. ELMER WEST, *Defendant.*[1]

WILLS—NONINTERVENTION WILLS—TRUSTEES — POWERS. Under a nonintervention will imposing a trust in the executors beyond the proving of the will, they act as trustees, and it is an error in terms to call them executors, but without prejudice, where the decree gave them the attributes and powers of trustees.

TRUSTS—COMPENSATION OF TRUSTEES—FEES AS EXECUTORS. Trustees under a nonintervention will are not entitled to the statutory fees as executors until the termination of the trust.

SAME—COMPENSATION—NECESSARY SERVICES. A trustee under a nonintervention will may be allowed fees for necessary services of a continuing nature not performed by the other trustee, and properly chargeable as current expenses; he being entitled to reasonable compensation, under Laws 1917, p. 687, § 158.

SAME—COMPENSATION—ALLOWANCE. The court should not fix and make a division of fees between co-trustees, which it has decided can be allowed only at the termination of the trust, but should leave the matter to the decree of the court making final settlement.

[1]Reported in 173 Pac. 44.

SAME—COMPENSATION—STATUTES. Laws 1917, p. 666, § 92, making provision for a final accounting by trustees under a nonintervention will, governs every case in which the trust was not fully executed prior to the time the act took effect, notwithstanding Rem. Code, § 1444, provided for no such accounting.

SAME—REMOVAL OF TRUSTEE. A trustee should not be removed for want of harmony between co-trustees, when there was nothing to prevent future harmonious cooperation, and he had committed only error and not a breach of trust.

COSTS—IN PROBATE—DISCRETION. Where a contest over the management of an estate was mainly a personal one between co-trustees, it is proper to deny costs to either party.

Cross-appeals from a judgment of the superior court for Spokane county, Oswald, J., entered October 8, 1917, upon findings favorable to the defendant, in consolidated actions for equitable relief, tried to the court. Modified.

Stephens & Jack, for plaintiffs.

E. O. Connor, for defendant.

ELLIS, C. J.—In March, 1917, William Forrest Cornett and Gordon Forrest Cornett, both at the time minors, by William H. Cornett, their guardian *ad litem,* and William H. Cornett, in his individual capacity and as trustee under the will of Roberta L. Cornett, deceased, brought an action in equity in the superior court for Spokane county to remove the co-trustee, J. Elmer West. At the same time, the same parties filed in the same court a petition to the same end in the probate proceedings in the estate of Roberta L. Cornett.

The principal grounds advanced for the removal were that West, without consulting his co-trustee, had borrowed money in the name of the estate, which, with other funds of the estate in his possession, he used in paying fees claimed by himself as executor, and, in addition thereto, had appropriated to his own use $150

per month as fees for special services in collection of rents of the "Altadena" apartments belonging to the estate. For the rest, the pleadings present an unprofitable tale of charges and countercharges of the two trustees touching their treatment of each other, which we shall not repeat. By stipulation the two proceedings were consolidated for the purpose of trial, and are here for review upon the same record.

Roberta L. Cornett died testate in California on November 3, 1914, leaving surviving, plaintiffs, her husband, and their two sons. The elder son was, at the time of trial, twenty-one years old, the younger, fourteen. She died possessed of a considerable estate, her separate property, situated in the states of Washington and California. By nonintervention will, she devised and bequeathed all of her property to William H. Cornett and J. Elmer West, whom she named as executors and trustees in trust for the payment of her debts and funeral expenses, and a legacy of $100 to her half brother, the remainder to be held, managed and controlled by the trustees until the younger child shall have arrived at the age of twenty-one years, the property then to be divided equally, share and share alike, between the husband and children. The provisions of the will for other contingencies are not here material.

At the time of her death, the testatrix and her family were residents of California, where the husband still resides. The other trustee, West, is a resident of the state of Washington. Probate proceedings were had in both states. The will was probated in Spokane county, Washington, on November 11, 1914. The inventory was filed, notice to creditors was published, and a decree declaring the estate solvent was entered on December 29, 1914. The administration of the trust estate then proceeded, West, as resident executor and trustee, managing the estate in Washington, Cornett,

as resident executor and trustee in California, managing the estate there. The probate court in California allowed Cornett $1,445 executor's fees, which he claims to have deposited in bank to the credit of the estate. The time for filing claims expired December 29, 1915. On January 8, 1916, West made the inheritance tax report to the state tax commission, deducting the sum of $8,308.90 for executors' fees. The report was approved by the commission, and the inheritance tax based thereon in the sum of $1,498.94 was paid. The estate in California, consisting of the family home, was sold, the net proceeds being $43,000. Of this, $22,500 was loaned at seven per cent interest, and the balance was deposited in bank at four per cent interest. The Washington property consists of an apartment house of thirty-two apartments in Spokane, called the "Altadena." It was built in 1908, and, with the grounds, cost $145,000 to $150,000. It is mortgaged for $30,000 at six per cent interest. All other property in this state has been sold. West had managed the property in this state for Mrs. Cornett for many years, superintended the building of the Altadena, and had since managed it for $100 per month up to the time of her death.

West, conceiving that the administration of the estate by the executors, as such, closed with the year for filing claims, and being advised that Cornett, because of his nonresidence, was disqualified to act as executor in this state, claimed that statutory executor's fees on the estate in this state in the sum of $8,308.90 were then due and that he alone was entitled to them. He borrowed $7,000 in the name of the estate, and with this and other money on hand paid himself that sum, notifying Cornett of the fact. He also retained $150 per month for his services in the management of the Altadena. West also claims that he will further be en-

titled to trustee's fees on the closing of the trust. Cornett, on the other hand, claims that the duties of both Cornett and West, as executors and trustees, are of the same character and inseparable throughout the whole trust period from the probate of the will; that these duties were, are, and will continue to be, in substance those of trustees, from the time of the proof of the will till the trust is finally closed and the estate distributed as the will provides; that no fees can be allowed to either as executors at any time, nor as trustees until that time, and that, if West be allowed any sum for conducting and managing the Altadena apartments, it should only be such reasonable sum as others would do the work for, and West should account for it as a part of his fees as trustee when the trust is closed. He further claimed that, at that time, the fees should be divided equally between the trustees.

The court found (we eliminate many intermingled legal conclusions) that the duties of the executors and trustees imposed by the will are such that they cannot be separated and continue during the full period of the trust; that the executors' fees are not due, but must remain in abeyance till the completion of the trust period, when the youngest child shall be twenty-one years old; that West's services in the management and collection of rents of the Altadena apartments are reasonably worth $125 per month; that West, as executor, had legal authority to borrow the $7,000, but not at this time to apply the money on his fees. The court further found that the only ground for lack of harmony between the trustees was the disagreement over the fees, and that there are no grounds for the removal of West.

Upon appropriate conclusions of law, the proceedings for West's removal were dismissed without costs or attorney's fees to either party, and a decree was en-

tered adjudging that West is not entitled to any compensation other than for the entire period from the probate of the will to the time of distribution therein provided; that he is entitled to retain $125 per month, to be deducted from such compensation as may hereafter be awarded by a court of competent jurisdiction when the final accounting and decree of distribution shall be made; that the borrowing of money by West be disapproved, and that he recast his accounts and refund the money to the estate, and also all sums retained by him in excess of $125 per month; that Cornett and West are executors under the will for the entire period from the date of its probate until final accounting and decree of distribution, when the youngest son shall attain his majority, and are entitled to compensation as executors and not as trustees, but that such compensation cannot be definitely determined until one or the other die, be removed, resign, or the final accounting takes place. The court further decreed, in substance, that the compensation for the period from the probating of the will till the probate code of 1917 went into effect should be such part of the statutory compensation provided by the prior law as that period bears to the whole trust period, and that compensation for the period from the taking effect of the 1917 probate code till final settlement shall be such as the court, pursuant to that code, shall fix, or as subsequent laws may provide. Finally, the court decreed that nothing in the decree should be construed as determining what compensation the executors, or either of them, shall ultimately be entitled to receive. Neither party was allowed costs or attorney's fees in the suit in equity. Both parties have appealed. For convenience we shall designate the parties plaintiffs and defendant.

Plaintiffs first contend that the court erred in holding that Cornett and West are executors and not trus-

tees. It is true the court so held and, as we think, erred, but only in a use of terms. The dominant purpose of the will was to create the trust and provide for its administration by the two men as trustees. They did not administer, and were not empowered to administer, the estate as executors. All they did in that capacity was to perform the things required by statute to qualify or install themselves as trustees preliminary to carrying out the trust. They proved the will, filed the inventory, published notice to creditors and procured an order of solvency. Thereafter every act performed, even including the payment of debts, was performed by them as trustees under the direction of the will. As soon as they were, under the law, qualified or permitted to act at all or in any capacity in the management of the estate, they were trustees by the terms of the will. Whenever a non-intervention will reposes a trust in the executor beyond the mere proving of the will and procuring the order of solvency, the executor is in fact, and essentially, a trustee for all purposes necessary to execute the terms of the will, whatever he may be called. *Martin v. Moore,* 49 Wash. 288, 94 Pac. 1087; *Fulmer v. Gable,* 73 Wash. 684, 132 Pac. 641; *Smith v. Smith,* 15 Wash. 239, 46 Pac. 249.

It follows that, in calling these trustees executors for the full period of the trust, the court committed an error in terms. But it held that their powers and duties were coextensive in time with the period of the trust, and adequate, under the will, for the performance of the trust. They were trustees, and the substance of the decree was to adjudge them to be such by determining that the will gave them the attributes, powers and duties and imposed upon them the limitations of trustees. It was obviously for this reason that the court held, and properly so decreed, that they were not

entitled to fees as executors, nor to anticipate the performance of the trust by paying themselves fees as trustees in advance of such performance. It was for this reason that West was required by the decree to recast his account and refund the money borrowed, and all other sums used by him in paying his fees in excess of the monthly sum of $125 per month for special services as performed in the care and rental of the Altadena. West, being a trustee and, so far as the management of the estate was concerned, possessed only of the powers of a trustee, and those only in conjunction with his cotrustee, had no authority to borrow money in the name of the estate without the concurrence of his cotrustee. The trial court was in error in holding otherwise. The decree, therefore, should have provided that he personally take up the loan and relieve the estate from all apparent obligation therefor.

Plaintiffs also contend that the court erred in allowing West any sum for the care and rental of the Altadena apartments. These were necessary services which the other trustee could not perform. They were of a continuing nature. It was essential that they be performed each month from the inception of the trust. West had performed them for years prior to testatrix' death, receiving therefor $100 per month. It is fairly to be assumed that she intended that he should continue that service and receive a reasonable compensation. The other trustee had consented that he continue to perform them for the same compensation as before. A careful consideration of the evidence, in the light of his former management of the apartments for $100 a month, convinces us that the court should have fixed West's monthly compensation at that sum, requiring him to refund the excess which he had retained. But it is now urged that neither trustee was entitled to any pay except commissions computed under the statute

governing fees of executors and administrators. Our decision in *Shufeldt v. Hughes,* 55 Wash. 246, 104 Pac. 253, is cited in this connection. For two reasons that case is not controlling on the issue here. In the first place, the will there involved was not a nonintervention will. In the second place, one of the executors was not a trustee and the trust could begin only after final settlement of the estate in the ordinary manner. There was no devise to the executors in trust or otherwise. It may be, as in that case intimated, that, where the duties imposed upon the executor by a nonintervention will are only the ordinary duties of an executor in other cases and no compensation is provided in the will, the executor should be allowed the compensation, and only the compensation, provided by the statute applicable to other wills. But where, as here, a nonintervention will makes the executors trustees for a long period, no compensation to the trustees being provided for in the will, they are entitled to reasonable compensation for extra services commensurate therewith. In fact such is now the rule of compensation applicable to all services of executors and administrators, as such, under the express provisions of the probate code of 1917. See ch. 156, Laws 1917, p. 687, § 158. Where the trustee personally performs services in their nature properly chargeable as current expenses of the estate and for which he might have employed another, there is no good reason why he should not receive reasonable pay for such services when and as they are performed. For a well considered case closely analogous in principle see: *Turnbull v. Pomeroy,* 140 Mass. 117, 3 N. E. 15. See, also, *May v. May,* 109 Mass. 252; *In re Hagerty's Estate,* 97 Wash. 491, 166 Pac. 1139.

Another thing should be noticed in this connection. The decree attempts to determine for what part of the trust period the fees should be fixed pursuant to the

old statute and for what part pursuant to § 158 of the probate code of 1917 (Laws 1917, p. 687). The court having already correctly determined that the fixing of the trustees' fees must be deferred till the final settlement of the trust, this part of the decree was beyond the present issues. The court which must finally pass upon the fixing and division of the fees in its decree of final settlement should not be hampered by a decree forestalling any phase of that question. The clause of the decree to which we have referred should have been omitted.

Defendant's contention in this connection that no final accounting or decree of distribution can be had on the estate here involved is not tenable. It is true that the law touching nonintervention wills, as it existed at the date of testatrix' death, made no provision for final accounting in court. Rem. Code, § 1444. But § 92 of the act of 1917, Laws 1917, p. 666, does make such provision, and should be held to govern every case in which the executor or trustee of a nonintervention will had not fully executed the terms of the will and distributed the estate prior to the taking effect of that act. That provision relates to a mere matter of procedure. *Strand v. Stewart,* 51 Wash. 685, 99 Pac. 1027. It does not affect injuriously any vested right. It in no sense interferes with the actual management of the estate by the executor or trustee. Herein lies a plain distinction between this act and the act of 1897 requiring all insolvent estates to be administered throughout in court, regardless of the terms of any will, which this court held could not apply to prior nonintervention wills. *State ex rel. Phinney v. Superior Court,* 21 Wash. 186, 57 Pac. 337. The obvious purpose of the provision for final decree in the act of 1917 is to make a record title of the estate distributed, a thing beneficial to all con-

cerned and not inimical to the powers of the executor or trustee to carry out the trust created by the will.

Plaintiffs earnestly urge that West should have been removed from the trusteeship on the showing made. Though a marked spirit of antagonism had developed between the trustees, it all seems to have grown out of the matters which we have discussed. These being adjusted, we incline to the view of the trial court that there is nothing to prevent the trustees from future harmonious cooperation in the management of the estate. In this connection it is pertinent to note that the duty of preserving harmony rests alike on both trustees. There is nothing to indicate that West has not acted in good faith on advice of counsel. Such applications are addressed largely to the discretion of the court and the power of removal should be cautiously exercised. As said by an eminent writer:

"The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy." 1 Perry, Trusts, p. 417, § 276.

West committed an error, but no breach of trust. The trial court found that he has "ably and efficiently managed the estate and property." We find nothing to indicate that his retention as trustee will jeopardize the trust. The court did not err in refusing to remove him.

Finally, each party claims the right to costs and attorney's fees, and that the same should be ordered paid from the estate. We think otherwise. The contest was one mainly personal to the trustees. We agree with the trial court that each party should bear his own

costs and disbursements. Plaintiffs are, however, entitled to their costs in this court.

The foregoing effectually disposes of every question raised by defendant's appeal.

The cause is remanded with direction that the decree be modified in accordance with the views herein expressed.

PARKER, MAIN, FULLERTON, and CHADWICK, JJ., concur.

[No. 14681. Department Two. May 8, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JANE DOE KELLY, *alias White*, *Appellant*.[1]

PROSTITUTION—ACCEPTING EARNINGS—PERSONS LIABLE. Rem. Code, § 2440, punishing "every person" who shall live with or accept any earnings of a prostitute, includes females as well as males.

SAME—INFORMATION—SUFFICIENCY. In a prosecution for accepting the earnings of a prostitute, it is not necessary for an information in the language of the statute to state the purpose for which the earnings were accepted.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 16, 1916, upon a trial and conviction of accepting the earnings of a prostitute. Affirmed.

Walter Metzenbaum, for appellant.

Alfred H. Lundin and *Lane Summers*, for respondent.

MOUNT, J.—This appeal is from a judgment convicting the appellant of accepting the earnings of a prostitute.

Two questions are presented upon the appeal: First, that the statute upon which the prosecution is based

[1]Reported in 172 Pac. 1175.

refers to male persons only and was not intended to include female persons; and second, that the information does not contain a statement of the acts constituting the offense in ordinary and concise language such as to enable a person of common understanding to know what is intended. The charging part of the information is as follows:

"She, said Jane Doe Kelly, alias White, whose true name is to the prosecuting attorney unknown, in the county of King, state of Washington, on or about the 18th day of September, 1916, did then and there wilfully, unlawfully and feloniously, without any lawful consideration therefor, accept the earnings, to wit, money, of one Alice Axtell, the said Alice Axtell then and there being a common prostitute, and the said money having been earned by said Alice Axtell in the practice of prostitution."

The statute, at § 2440, Rem. Code, provides as follows:

"Every person who

"(5.) Shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute;

"Shall be punished by imprisonment in the state penitentiary . . ."

It is argued by the appellant that the statute refers only to male persons and not to females. It is probably true that the language "every person who shall live with a common prostitute" refers only to male persons, because living with a prostitute carries the idea of cohabitation; but when the statute reads:

"Every person who . . . shall accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute . . ."

it seems plain that this language refers to females as well as to males; for, while a female might not cohabit with another female, it is plain that a female might meretriciously accept the earnings of a common prostitute, or might solicit a person to go to a house of prostitution for an immoral purpose, or solicit other persons to have sexual intercourse with a common prostitute. When the legislature used the words "Every person" at the beginning of this section, it intended, we think, to include females as well as males. This position is strengthened by a reference to the old statute (Rem. & Bal. Code, § 2903) which was in force before § 2440 was enacted, and which provided that:

"Any male person (who lives with, . . .) . . . or accepts any of the earnings of a prostitute,"

etc., should be guilty of a felony.

Upon the other question it is contended that the information does not state the purpose of accepting the money or how it was accepted. We think it was not necessary to state the purpose of accepting the earnings of a common prostitute. In the case of *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 633, this court held an information sufficient which was not as definite as the one under consideration. In that case, after reviewing a number of authorities, we said:

"The information charges the crime in the language of the statute so far as applicable to the facts, and in words well calculated 'to enable a person of common understanding to know what was intended.' It is sufficient."

We think that case is controlling upon this question.

We find no error. The judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, and FULLERTON, JJ., concur.

[No. 14707. *En Banc.* May 8, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Sandford C. Rose, Plaintiff*, v. JOHN M. RALSTON, *Judge etc., Defendant.*[1]

PROHIBITION — WHEN LIES — TO COURTS — ERRONEOUS JUDGMENT. Prohibition does not lie to prevent the court from entering a judgment in an action to restrain an execution sale, according to findings made after trial, upon refusing to admit further proof, where the judgment would at most be merely erroneous, the court having jurisdiction of the parties and the subject-matter.

Application filed in the supreme court March 9, 1918, for a writ of prohibition to prevent the superior court for Clallam county, Ralston, J., from entering a judgment. Denied.

T. F. Trumbull, for relator.

Nelson R. Anderson, for respondent.

PARKER, J.—The relator seeks a writ of prohibition from this court to prevent the judge of the superior court for Clallam county from entering a final judgment in conformity with his findings of fact and conclusions of law made in a case pending in that court wherein S. J. Lutz and A. V. Watts are plaintiffs, and this relator, Sandford C. Rose and Harry C. Bishop, as sheriff of Clallam county, are defendants; and particularly preventing the judge of that court from rendering any judgment setting aside and decreeing void a certain execution sale of a printing plant, which execution sale was made by Bishop, as sheriff, at the instance of Rose, as judgment creditor.

At all times in question the Bee Publishing Company has been a corporation existing under the laws of the state of Washington, and the owner of the printing

[1]Reported in 173 Pac. 51.

plant in question, except as it may have been divested of title thereto by the proceedings here involved. On October 3, 1916, Rose commenced an action in the superior court for Clallam county seeking recovery of damages from the Bee Publishing Company on account of an alleged libelous article published by that company in its newspaper in that county, of and concerning him. The trial of that action upon its merits resulted in a judgment rendered on November 5, 1917, in favor of Rose and against the Bee Publishing Company in the sum of $1,000. On December 12, 1917, Rose caused execution to be issued thereon and placed in the hands of the sheriff of that county, in pursuance of which the sheriff levied upon the printing plant of the Bee Publishing Company and gave notice of sale thereof to take place on December 22, 1917. Prior thereto and while the action for damages was pending, the Bee Publishing Company conveyed its printing plant to A. V. Watts, which conveyance, it is claimed by Rose, was with knowledge on the part of Watts that the action for damages was then pending, and with intent on his part to hinder, delay and defraud Rose as a creditor of the Bee Publishing Company. At all times here in question S. J. Lutz has been the holder of a chattel mortgage upon the printing plant of the Bee Publishing company to secure a debt of $2,500. On December 21, 1917, Lutz and Watts commenced, in the superior court for Clallam county, an action against Rose and the sheriff, seeking to enjoin the execution sale which was noticed by the sheriff to occur on the following day, and upon an emergency showing then made by them to the commissioner of the superior court for Clallam county, without notice, the commissioner entered an order restraining Rose and the sheriff from proceeding with the sale, and directing them to appear before the superior court of that county

on January 25, 1918, and show cause why they should not be enjoined from so proceeding. No formal temporary injunction was issued upon the return day of the restraining order, but the parties then agreed to proceed to try the case upon the merits, which was done at later hearings.

After the conclusion of the trial of the case, as counsel for Rose viewed the situation, but before the making of any findings of fact or conclusions of law or the rendering of any final decision by the court, the sheriff, at the instance of Rose, proceeded to sell the printing plant under the execution, which sale was made to Rose. This was done evidently on the theory that, since the return day of the restraining order had passed, and since no formal temporary injunction further restraining the sale had been issued, it might be lawfully had. The making of this execution sale being called to the court's attention, and the court having made no final decision in the injunction case, counsel for Lutz and Watts asked leave to produce proof of the making of the execution sale to Rose, to the end that, in rendering its final judgment in the injunction case, the court might make such order with reference thereto as would protect their rights should the court finally decide the injunction case in their favor upon the merits. This was but the asking for the opening of the case to admit further proof before it was finally decided by the court, and was granted by the court over the objections of counsel for Rose. Thereafter, on February 26, 1918, the trial judge made formal findings and conclusions in the injunction case, deciding, among other things, in effect that the execution sale to Rose should be set aside and held for naught. These facts we gather largely from the findings and conclusions made by the trial court in the injunction case, which findings and conclusions are made a part of the record

before us. We think these facts are controlling of the rights of the parties in this proceeding, regardless of other facts appearing in the record before us. We do not, however, state these facts as being conclusive upon any of the parties upon a review of the judgment which the trial court may ultimately render in the injunction case upon these or other findings which it may make therein when such judgment is properly before us for review.

It seems to us that this is but an attempt to have us prohibit the trial court from rendering a decision which, at most, will only be erroneous. It has become the settled law of the state that prohibition will not lie from this court to review and correct mere errors committed, or threatened to be committed, by a superior court, and thus take the place of appeal or review. *State ex rel. Miller v. Superior Court,* 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395; *State ex rel. Griffith v. Superior Court,* 71 Wash. 386, 128 Pac. 644; *State ex rel. Grant Realty Co. v. Superior Court,* 76 Wash. 376, 136 Pac. 144; *State ex rel. Calhoun v. Superior Court,* 86 Wash. 492, 150 Pac. 1168.

The contentions of relator's counsel here made to prevent the rendering of the threatened judgment are, in substance, (1) that the restraining order had expired when the execution sale was made, and therefore did not stand in the way of such sale, the trial court holding that the restraining order had become in effect a temporary injunction restraining the sale pending the action; and (2) that the trial court had no right to entertain the question of the setting aside of the execution sale, because of the close of the trial before the making of the sale. It seems clear to us that the question of whether the restraining order had become in effect a temporary injunction was a question the trial court had jurisdiction to decide at any time before

final judgment. It seems equally clear to us that the question of whether the trial court would open the injunction case to enable Lutz and Watts to show that the execution sale had taken place, and to make such a showing to the end that, in rendering its final judgment, the court might make such order with reference to the sale as would protect their rights should the court finally decide the case in whole or in part in their favor, was a question the trial court had jurisdiction to decide at any time before final judgment. The making of the sale had created a condition calling for something more than a mere prohibitory injunction to prevent its being made, and Rose, the purchaser at the sale, was a party to the injunction action.

We are of the opinion that the contentions here made in relator's behalf, so far as this record discloses, have to do only with possible errors which the trial court might commit in the rendering of its final judgment in the injunction case.

The writ is denied.

ELLIS, C. J., MOUNT, MAIN, CHADWICK, WEBSTER, HOLCOMB, and FULLERTON, JJ., concur.

[No. 14729. *En Banc.* May 8, 1918.]

THE STATE OF WASHINGTON, *on the Relation of M. E. Giles et al., Plaintiff*, v. WALTER M. FRENCH, *Judge etc., Respondent.*[1]

JUDGES—AFFIDAVIT OF PREJUDICE—HEARING. Under Rem. Code, § 209-1, requiring a judge, on filing an affidavit of prejudice, to "forthwith" enter an order for a change of venue, the court may, where an investigation is necessary, continue the cause until such times as the investigation may be properly made.

SAME—DISQUALIFICATION—CALLING IN JUDGE. Under Rem. Code, § 209-1, requiring a judge, upon the filing of an affidavit of prejudice, to change the venue or call in a new judge, his power is not exhausted by a single attempted exercise thereof; but having determined to call in another judge in the court of original jurisdiction he cannot subsequently change the venue to another court.

JUDGMENT—ORDERS—EX PARTE. After appearance by a party, it is error to enter an *ex parte* order, as the statute entitles the parties to notice of all proceedings.

Application filed in the supreme court March 18, 1918, for a writ of mandate to compel the superior court for Kitsap county, French, J., to vacate an order for a change of venue. Granted.

F. W. Moore, Walter D. Peters, and *Higgins & Hughes* (*Hyman Zettler,* of counsel), for relators.

J. W. Bryan, for respondent.

FULLERTON, J.—This is an application for a writ of mandamus, directed to the Honorable Walter M. French, as judge of the superior court of Kitsap county, commanding him to vacate an order for a change of venue entered in a cause pending in the court named.

The cause is before us on the application for the writ and the return of the judge thereto. From these we do not find any substantial disagreement as to the facts.

[1]Reported in 172 Pac. 1156.

It appears that, in April, 1917, Marion Garland and Arthur C. McLane, as plaintiffs, began an action against M. E. Giles, Frye & Company, John C. Higgins, Herman Behrens and others, as defendants, to recover in damages, charging a conspiracy on the part of the defendants to ruin the plaintiffs' business. On May 1, 1917, the defendant Giles appeared in the action by counsel and timely filed a motion for a change of judge, accompanying the motion with an affidavit of prejudice against the presiding judge, Walter M. French, in the form prescribed by the code, Rem., § 209-2. The motion was regularly placed upon the motion calendar and noted for hearing at the next regular motion day, namely, May 5, 1917, and on that day was called to the attention of the presiding judge and by him ordered continued. Other defendants thereafter appeared and, together with the defendant Giles, filed motions against the complaint and noted the same for hearing on Saturday, May 19, 1917, a regular motion day of the court. There was then pending in the court another proceeding between the same plaintiffs and the defendant Giles, in which a similar motion and affidavit had been filed by the defendant Giles. Certain preliminary motions had been heard in this proceeding by a judge of King county called in to preside because of the disqualification of Judge French, and the cause had been set down for trial upon its merits for Friday, May 18, 1917, the day prior to the day the motions were noted for hearing in the cause now under consideration.

When it became known that the King county judge would be in attendance in Kitsap county on May 18, 1917, counsel, some of whom resided in King county and had their offices therein, were notified that the visiting judge would hear the pending motions in the present case on that day, notwithstanding the actions

had been noted for hearing on the day following. Counsel on both sides gave heed to the notice and appeared, and on that day presented the motions on their merits to the visiting judge. Rulings were also made by the visiting judge on the same day, and orders made thereon which were duly entered of record by the clerk in the minutes kept by him of the proceedings. Between the date of this hearing and January 15, 1918, other motions were heard by the same judge and orders made thereon. These were heard by the judge sitting in chambers at his office in King county, pursuant to stipulation of counsel that they might be so heard. It appears further, however, that this was merely for the convenience of the judge and of counsel, all of the papers in the proceedings being entitled as of the court in the county where the action was then pending. On the date last given, Judge French, purporting to rule upon the motion made on May 1, 1917, and noticed for hearing five days later, entered an order changing the venue of the action to King county. This order was made without notice to the defendants or to their counsel and without knowledge on their part, the plaintiffs alone being represented at the time. This is the order sought to be vacated by the present proceeding.

The statute prescribing the action of a judge of a superior court against whom prejudice is established by the filing of the affidavit mentioned therein reads in part as follows:

"In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court." Rem. Code, § 209-1,

This statute, while somewhat imperative in its language, cannot be given, it is plain, a too literal interpretation. As we said in *State ex rel. Lefebvre v. Clifford,* 65 Wash. 313, 118 Pac. 40, the spirit and reason of the law must be regarded to the end that there should be no undue interference with the orderly administration of justice; holding that the application must be made timely and is too late if made after hearings have been had or a trial has been entered upon before the judge against whom the charge of prejudice is made. Since, therefore, the statute was to promote and not to interfere with the orderly administration of justice, the command of the statute that the presiding judge "forthwith" do some one of the things therein provided must be construed so as to best accomplish its purpose. In a county where there is only one judge the proper disposition of the case may require an investigation, inconvenient or impossible to make at the time the affidavit is called to the judge's attention, and in such an instance we are clear that the judge may continue the cause until such time as the investigation can be properly made. We are clear, also, that, if the judge decides to let the cause proceed in his own court and call in another judge to hear it, his power is not exhausted by a single attempted exercise of the power. If, for example, another judge is called to try the case and for any reason may be unable to conclude it, the disqualified judge may call in another, and his powers in that respect continue until final judgment is entered. But we think that, when a course is once determined upon, the presiding judge is without power to recall it and determine upon another; that, after he has determined that the cause shall be tried in the court of original jurisdiction and another judge has been called in to hear it, he cannot resume jurisdiction and order the cause transferred to another jurisdiction. If

the power exists it can be exercised in the midst of a trial as well as at another time, and in effect do the very things the statute sought to avoid. This is the effect of our holding in the case of *State ex rel. O'Phelan v. Superior Court*, 88 Wash. 669, 153 Pac. 1078. In that case an affidavit of prejudice had been filed and another judge called to try the cause. Ten days thereafter the presiding judge entered an order changing the venue to another county. This was held to be beyond the powers of the presiding judge. A parallel situation is presented here. Not only had another judge been called in to hear the case, but he had entered orders therein, and was proceeding regularly with the hearings when the order changing the venue was entered.

It is true that here no formal entry was made calling in another judge to hear the cause, and it is true also that the trial judge states in his return that the judge who entered upon the hearing did not do so under his direction. But elsewhere it appears that the presiding judge recognized his own disqualification and had knowledge that another judge was proceeding with the hearings. A formal order calling in another judge was not a jurisdictional requirement. To act or acquiesce was sufficient in this regard, and we think there is no question other than that there was here both action and acquiescence. It follows that the subsequent order changing the venue was beyond the powers of the court.

The order was erroneous for another reason. It was made *ex parte*. The defendants had appeared in the action, and the statute entitled them to notice of all subsequent proceedings.

The writ will issue.

ELLIS, C. J., CHADWICK, MOUNT, MAIN, PARKER, HOLCOMB, and WEBSTER, JJ., concur.

[No. 14003. *En Banc.* May 9, 1918.]

THE CITY OF RAYMOND, *Appellant*, v. WILLAPA POWER COMPANY, *Respondent*.[1]

WATERS AND WATER COURSES—GRANT TO CITY—DEED. Merely an easement is granted for the purposes stated, and no title to the water itself passes by a deed to a city granting the exclusive right and privilege to take and appropriate to its own use for all purposes any and all water flowing or which may hereafter flow into the stream over or across described lands of the grantor, together with the right to enter for the purpose of constructing flumes, pipe lines, etc., and also the privilege of flooding or backing water upon the premises; hence the owner of the servient estate may make such use of it as is not inconsistent with the easement granted (Overruling, on rehearing, *Id.*, 98 Wash. 317; Fullerton, Mount and Main, JJ., dissenting).

SAME—GRANT TO CITY—EASEMENT—ADVERSE USE. If a water deed conveyed merely an easement to take and appropriate water, lay pipe lines, and flood or back water upon the premises, there can be no adverse title by prescription, where there was no interference, either present or threatened, with the easement and rights granted.

Appeal from a judgment of the superior court for Pacific county, Mackintosh, J., entered October 19, 1916, dismissing an action for an injunction, after a trial before the court upon an agreed statement of facts. Affirmed.

Robert G. Chambers, Welsh & Welsh, and *Wallace Mount, Jr.,* for appellant.

Fred M. Bond, for respondent.

ON REHEARING.

WEBSTER, J.—This case was originally heard and decided in Department Two. After the opinion was filed, which may be found in 98 Wash. 317, 167 Pac. 914, a petition for a rehearing was granted and the case was thereafter considered by the whole court. The facts,

[1]Reported in 172 Pac. 1176.

which are fully set forth in the departmental opinion, are correct with the exception that the court was in error in stating that the water to be diverted by respondent's dam for power purposes would be returned to the stream at a point *above* the city's contemplated intake pipes. By reference to the blue print or map which was filed as an exhibit in the case, as well as to the findings of the trial court, we ascertain that the power dam of respondent in section 6 in township 13, north, range 8, west, W. M., is several miles below the intake dam which appellant contemplates constructing in section 19, and the water diverted will be returned to the stream about 900 feet below respondent's dam.

All of the judges agree that a proper solution of the questions presented depends upon the nature of the rights acquired by appellant under the deed from the Raymond Water Company; the respondent contending that the instrument conveyed an easement only, while appellant insists that it acquired the absolute ownership of the water itself. In the former opinion, it was held that:

"It is a grant of the water itself, conveying to the grantee all of the title and interest therein, in so far as the title was vested in the grantor by reason of the ownership of the fee of the lands. As against the grantor, the grantee can, under the terms of the grant, divert the water from the stream prior to the time it reaches the land, can divert it at any point upon the lands, and may, by dams or other obstructions, cause it to overflow, flood, or back upon the lands, or it may, as a matter of right, insist that it continue to flow thereover as it is wont to flow by nature, free from molestation by anyone."

A majority of the court are of the opinion that in thus construing the deed the department was in error, our present view being that the deed conveyed to appellant merely an easement for the purposes therein

stated. The granting clause of the deed, in so far as it relates to the property here involved, reads:

"Also giving and granting unto the party of the second part, its successors and assigns, the exclusive right and privilege to *take and appropriate* to its own use for any and all purposes any or all of the water flowing, or which may hereafter flow, into the south fork of the Willapa river or any of the tributaries of said river, over, across or through the following described real estate. [Here follows a description of the property.] Also giving, granting and conveying unto the party of the second part, its successors and assigns forever, the right to enter upon the said lands above described or any part thereof for the purpose of taking and appropriating said water or any part thereof, and for the purpose of laying and constructing flumes and pipe lines or both and for the purpose of repairing, relaying or renewing said pipe lines so as to convey and conduct said water from said lands in such manner and by such means as the second party, its successors and assigns, may deem advisable. Also giving and granting unto the party of the second part the sole and exclusive right and privilege to overflow, flood, or back water upon all that part of the above described real estate."

Thus it will be seen the deed does not purport to convey to appellant title to the land itself, nor the right to erect a dam thereon. The extent of the privilege granted is to take and appropriate the water, to enter upon the lands for the purpose of laying and constructing pipes and flumes thereon, with the right to repair, relay or renew the same as necessity may require; also, the privilege of flooding or backing water upon the premises.

Prior to the execution of the deed to appellant, the Raymond Water Company had never used or appropriated the water for any purpose, its right thereto being merely that of a riparian owner. No title to the water itself passed by the deed, which, by its terms, merely granted the privilege of taking and appropriat-

ing the water and performing certain acts essential to the accomplishment of such purpose. *Crook v. Hewitt,* 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.,* 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Benton v. Johncox,* 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107; *New Whatcom v. Fairhaven Land Co.,* 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *Still v. Palousė Irrigation & Power Co.,* 64 Wash. 606, 117 Pac. 466; *Saunders v. Bluefield Waterworks & Imp. Co.,* 58 Fed. 133; 2 Kinney, Irrigation and Water Rights (2d ed.), § 772; 40 Cyc. 552.

Holding, as we do, that the right acquired by appellant under the deed was merely an easement to take and appropriate the water, it follows that the owner of the servient estate may make such use of it as is not incompatible or inconsistent with the easement granted. *Hayward v. Mason,* 54 Wash. 649, 104 Pac. 139, 59 Am. Rep. 61; *Burnham v. Nevins,* 144 Mass. 88, 10 N. E. 494; *Colegrove Water Co. v. Hollywood,* 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; *Hoyt v. Hart,* 149 Cal. 722, 87 Pac. 569; *St. Joseph Valley R. Co. v. Galligan,* 120 Mich. 468, 79 N. W. 685; *Smith Canal or Ditch Co. v. Colorado Ice & Storage Co.,* 34 Colo. 485, 82 Pac. 940, 3 L. R. A. (N. S.) 1148.

Since the respondent acquired all the right and title to the property, subject only to the easement conveyed by the prior deed to appellant, it may devote the property to any use it may see fit which is not inconsistent with the easement granted. It is not contended that appellant's right to take and appropriate the water is being interfered with or threatened; the theory of appellant's case being that it is the absolute owner of the water and that respondent's present and contemplated use of the same constitutes a continuous or repeated trespass which will be enjoined in equity. Moreover,

the decree of the lower court, in express terms, provides:

"This action is dismissed without prejudice on the part of the appellant, the city of Raymond, as to any other action against the defendant, Willapa Power Company, should at any time hereafter said defendant interfere in any manner whatsoever with any of the rights granted to the said city of Raymond, which said city of Raymond may have by virtue of that certain deed executed on the 17th day of August, 1915, wherein the Raymond Water Company is grantor and the city of Raymond is grantee, . . . it being at the time decreed that the defendant in this action is not now interfering and is not threatening to interfere with any rights the plaintiff in this action may have under and by virtue of said deed."

In the former opinion, the department took judicial notice of the fact that modern science had demonstrated that the use of water in power plants and for other purposes where human beings must of necessity be in attendance about it seriously endangers its purity, rendering it unfit for human consumption. This however, was upon the assumption that the water which respondent intends to divert to its power plant would be returned to the stream at a point above appellant's contemplated intake pipes. As we have already noted, such is not the fact, and, in the nature of things, a pollution of a stream at a point miles below appellant's intake dam could not affect the purity of the water entering its intake pipes.

It is also suggested in the departmental opinion that, if respondent's present or intended use of the property should remain unchallenged, such use might ripen into a title by prescription. This argument is necessarily predicated upon the construction placed by the department upon the deed to appellant. Since we now hold that the deed conveyed a mere easement, and there

is no interference, either present or threatened, with the rights therein granted, this argument must fail. There can be no title by prescription, as a matter of law, where there has been no adverse or hostile assertion of rights as a matter of fact. *Wintermute v. Tacoma Light & Water Co.*, 3 Wash. 727, 29 Pac. 444.

Should respondent, at any time hereafter, assert the right to take any action which may be hostile or adverse to the enjoyment of the rights conveyed by appellant's deed, there is ample protection afforded by the provisions of the decree above set forth. The judgment is affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and PARKER, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the opinion of the majority. I think it wrong in its construction of the deed, the operative parts of which are recited in the opinion, but I am clear that it is wrong for another reason. The cause was tried upon an agreed stipulation as to the facts. This stipulation contains the following provisions:

"That plaintiff is the owner of and is maintaining and operating a water plant and water works, and by and with the same is furnishing and supplying said city of Raymond and the inhabitants thereof with water for domestic uses and for municipal uses and purposes, and the point on the south fork of the Willapa river where the plaintiff is taking water from said river for such purposes is in the northeast quarter of the southwest quarter of section 31, township 14 north, range 8, west W. M., and that the city of Raymond and the inhabitants thereof depend entirely upon the waters of the south fork of the Willapa river so taken out of the south fork of the Willapa river for domestic use and for municipal uses and purposes. That the said water supply is inadequate to meet the requirements

and necessities of said city and the inhabitants thereof, and that said city of Raymond and the inhabitants thereof depend upon the plaintiff's water plant for a supply of water for domestic uses and municipal uses and purposes.

"That, in order to furnish and supply an adequate amount of fresh water for said city of Raymond and the inhabitants thereof, it is necessary that plaintiff use the water of said south fork of the Willapa river at the point and place aforesaid where plaintiff intends and proposes to locate its dam and works, to the extent of 30 cubic feet of water per second of time, and by said dam and works impound said waters and divert the same and carry the same into and through the city of Raymond for the purpose, in said city, of supplying said city and the inhabitants thereof with an adequate supply of fresh water for domestic uses and municipal uses and purposes; and that, in order that plaintiff may protect said water from pollution, it is necessary that plaintiff use the lands above described for said purposes and the same is necessary and required by the plaintiff for said uses and purposes, and the object of said condemnation suit is for said purposes and for the purpose of supplying the city of Raymond and the inhabitants with water for domestic use and for municipal uses and purposes.

"That the city of Raymond is the owner of the water and also the land at the place aforesaid where it takes said water out of said south fork of the Willapa river. That the city of Raymond has expended a large sum of money, to wit: the sum of $140,000, and the said water plant consists of dams, water pipes, reservoir, pumping station, supply and distribution mains, and the water is taken from said south fork of the Willapa river at the place hereinabove mentioned and said water is used by the city of Raymond for the purpose of supplying the city and the inhabitants thereof with water for domestic use and municipal uses and purposes; and the city of Raymond intends to continue to operate its said water plant and system to furnish said water to its inhabitants thereof for domestic use and municipal uses and purposes."

The land described as the place where the city of Raymond is now taking water from the river named is below the place on the stream where the respondent is constructing its power plant. The opinion, therefore, is in error in assuming that the city is not making use of the waters of the stream below the place of location of the respondent's plant. It is true that the city contemplates changing its place of diversion from a point below to a point above the place, and while I freely confess a mistake in this and in another regard in my statement of the fact in the former opinion, the principle on which the opinion rests remains the same. The city desires to keep the water which it uses free from the possibility of pollution, and, in my opinion, the deed is sufficient to enable it to do this by the remedy of injunction, even if it does not convey title to the water flowing over the land in dispute.

That there is danger of pollution from this source is evidenced by the fact that the city has already found it necessary to resort to the public health officers to maintain cleanliness about the respondent's works. The health of so considerable a community as the city of Raymond being at stake, there ought not to be any too nice refinements in the construction of its deeds of conveyance, and it is too much of a refinement to say that it acquired nothing by its deed other than what it already had as a lower riparian proprietor on the stream.

MOUNT and MAIN, JJ., concur with FULLERTON, J.

[No. 14172. Department One. May 9, 1918.]

IN RE PETITION OF THE CITY OF SEATTLE. THE CITY OF SEATTLE, *Respondent*, v. WASHINGTON REFINING COMPANY, *Appellant*.[1]

EMINENT DOMAIN — DAMAGES — INSTRUCTIONS. In condemnation proceedings for an alley which divided appellant's plant into two tracts, upon an issue as to the damage to the remainder, a requested instruction to the effect that the jury should not consider the fact that the city might grant a permit to connect the two tracts by overhead or underground crossings is not covered by a general instruction that the abutting property owner has no greater rights to the alley than any other inhabitant of the city; and it is error to refuse the request where evidence of the damage was based upon the assumption that the owner had no right to make the connection.

SAME. Such requested instruction is not covered by an instruction that the jury might consider damages caused by compliance with any ordinance of the city governing the erection of such plants as the owners, where it referred to fire ordinances in evidence and not to any ordinance permitting connections over or under the alley.

APPEAL—RECORD—INSTRUCTIONS. Where all the instructions were not embodied in appellant's abstract on appeal, they may be brought up in a supplemental abstract or in the record.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 29, 1916, upon the verdict of a jury awarding damages in condemnation proceedings. Reversed.

Tucker & Hyland, for appellant.

Hugh M. Caldwell and *James A. Dougan*, for respondent.

MAIN, J.—This is a proceeding instituted by the city of Seattle, under its power of eminent domain, for the purpose of taking a strip of land thirty-nine feet wide to be used as an alley. The appellant, the Washington Refining Company, was the owner of a portion of the

[1]Reported in 172 Pac. 1161.

property through which the proposed alley was to be extended. This property consisted of a tract, rectangular in form, about 130 or 140 feet by 240 feet. It was bounded on the east by Westlake avenue, on the west by Dexter avenue, and on the south by Highland drive. The property was used for a storage and distributing station for gasoline, lubricating oils, kerosene, distillate, and other petroleum products. The property, before the alley was proposed, consisted of one industrial unit, and after being separated by the alley it would consist of two such units. In other words, the property now devoted to the purpose specified will, after the alley is established, instead of being one tract of land, consist of two of approximately the same size on opposite sides of the alley. The evidence as to the value of the land taken was not disputed by the appellant. No damages were allowed by the jury to the property not taken by reason of the severance of the property taken.

The appeal presents only questions as to whether there was error relating to the question of the assessment of damages to the portion of the property not taken. The proposed alley passed over the property of a considerable number of persons other than the appellant here; but since there is but the one appeal, no reference need be made to other property owners affected by the improvement.

It is first argued that there was no competent testimony in the case to warrant a verdict of no damage to the remainder. Whether the remainder was damaged was, of course, a question of fact, the city's witnesses testifying that there was no such damage, and the appellant's witnesses testifying that there was damage in a considerable amount. Even though it might appear that the weight of the testimony upon this ques-

tion was with the appellant, yet it was a matter for the jury to determine. It cannot be here held, as a matter of law, that there was no evidence to sustain the verdict.

A number of the assignments of error relate to the failure of the court to give certain requested instructions and to certain instructions which were given. Upon the question of damage to the remainder, the appellant requested an instruction to the effect that, in determining such damage, the jury were not to take into consideration the fact that the city might at some future time grant a permit to the appellant to connect the operations in the two units of its plant, separated by the alley, by either an overhead crossing or underground conduits. The respondent does not seem to question the correctness of this request, but claims that it was covered in an instruction given, wherein the jury were told that, when the alley was taken for street purposes, the city became the owner of the fee thereof, and the owners of abutting property had no greater rights to the use of such alley than any other inhabitants of the city. It does not seem to us, however, that this instruction covers the ground contained in the request which was refused. To say that the abutting property owner has no greater rights to the alley than any other inhabitant of the city is not the same thing as telling the jury that, in determining damages to the remainder, they should not take into consideration the fact that the city might at some future time permit an overhead crossing or underground conduit. It must be remembered that in this case it was not proposed by the city in any legally binding form, or at all, to grant to the appellant the right to such overhead crossing or underground conduit. The requested instruction was appropriate in the light of the evidence taken. When the appellant's engineer was testifying in chief,

he was asked in substance whether his testimony as to damage to the remainder was based on the assumption that the appellant had no right to connect the two units of the plant by crossing the alley either overhead or underground, and answered in the affirmative. On cross-examination, over objection, he was asked whether, if the city should permit such a crossing of the alley, it would modify the amount of damage to the remainder. In view of the fact that the city did not bring into the case, in any legally binding form, the fact that it would in the future grant such a permit, it seems to us that the jury should have been expressly told that they should not take that fact into consideration in determining damages to the remainder.

The respondent refers to another instruction in which the jury were told that, if they found from the evidence that any ordinance of the city governs the erection of such plants as the Washington Refining Company, they should, in arriving at their verdict, take into consideration such damages, if any, as might be caused in order to comply with such ordinance of the city. This instruction obviously does not relate to any ordinance under which the appellant might obtain a permit either to arcade the alley or to cause pipes to be placed thereunder; but it unquestionably does relate to the fire ordinance which was introduced in evidence. Even though it did relate to the permit ordinance, if there be such, it still would not cover the question. As already pointed out, this record does not show that the city is legally bound to grant a permit, and, in the absence of such a showing, the fact that it might at some future time, in its discretion, grant such permit had no proper place in this case. The instruction requested, or one of like import, should have been given.

But the respondent claims that the question as to the requests refused and the instructions given is not properly here because all of the instructions are not embodied in the appellant's abstract. They do, however, appear in the supplemental abstract, as well as in the record. All the cases cited by the respondent upon this question were decided prior to the passage of the abstract law and were cases where all of the instructions given were not embodied in the record. As to the other assignments of error not here specially mentioned, relating to the requests refused and the instructions given, it may be said, without reviewing them in detail, that we find no error in the instructions given; and as to the requests refused, in so far as they were applicable to the case and correctly stated the law, they were sufficiently covered by the instructions given.

The judgment will be reversed, and the cause remanded with direction to the superior court to grant a new trial.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ., concur.

[No. 14325. Department Two. May 9, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Mason County Power Company, Plaintiff*, v. THE SUPERIOR COURT FOR MASON COUNTY, *John R. Mitchell, Judge, et al., Respondents.*[1]

EMINENT DOMAIN—STATE PROPERTY — WATER RIGHTS — STATUTES. The right to acquire state property is not granted by Laws 1917, p. 447, § 4, declaring that the beneficial use of water is a public one, and providing that any person may exercise the right of eminent domain to acquire any property or rights necessary for the storage of water for beneficial uses; since the power must be clearly granted and will not be implied, and the statute must be strictly construed; and especially since the act, being part of the general water code, was not intended to, and did not, repeal Rem. Code, § 6828, covering proceedings to condemn state property.

SAME — STATUTES — RETROACTIVE EFFECT. Where there was no right to condemn state property at the time the proceedings were instituted, subsequent legislation authorizing the condemnation of state property would not retroactively affect or sustain the suit.

Certiorari to review a judgment of the superior court for Mason county, Mitchell, J., entered July 10, 1917, dismissing proceedings to condemn land for an electric power plant. Affirmed.

Frank C. Owings, for relator.

Peters & Powell, for respondents.

ON PETITION FOR REHEARING.

PER CURIAM.—On petition for rehearing herein, the relator, conceding the correctness of all other matter in the opinion filed on January 16, 1918, 99 Wash. 496, 169 Pac. 994, but referring to the remark:

"We find no other statute in the laws of this state permitting either a corporation or a private individual to acquire state lands or any rights therein for the same purposes as those involved herein,"

[1]Reported in 173 Pac. 19.

calls attention now to § 4, chapter 117, Laws of 1917, p. 447, as follows:

"The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this act and use the same in common with the former owner, and including the right and power to condemn an inferior use for a superior use. In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one"

and prays for a rehearing.

There are two or more valid reasons why the above legislation cannot apply to relator's case:

(1) The power to condemn the property of the state must be clearly granted and will not be implied. The provision above quoted does not clearly or expressly grant such power. The statutes granting such power will be strictly construed. *Seattle & M. R. Co. v. State,* 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *State ex rel. Attorney General v. Superior Court,* 36 Wash. 381, 78 Pac. 1011; *State ex rel. Wauconda Inv. Co. v. Superior Court,* 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E 1076.

(2) The section cited is a part of the general water code enacted in 1917 (Laws of 1917, p. 447), not apparently intended to cover this proceeding to acquire state property by eminent domain at all, and not repealing the provisions therefor (Rem. Code, § 6828 *et seq.*), which specifically dealt with the matter.

(3) Tilden's rights were acquired prior to the passage of the act of 1917. Relator's suit was instituted six months prior to the enactment of that law. Relator

having no right to condemn at the time it instituted its proceedings, the subsequent legislation could not retroactively affect the matter and grant the right.

For these and the reasons stated in the original opinion, a rehearing is denied.

[No. 14409. Department One. May 9, 1918.]

JULIUS JOHNSON, *Appellant*, v. JULIUS H. BLOEDEL *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian, struck by an automobile while he was hurrying across a street sixty feet from a crossing, without looking in the direction from which the automobile approached, it is not error to refuse requested instructions that a pedestrian is not bound to stop, look and listen, etc., and that he was not bound to anticipate an automobile coming from the south on the left-hand side of the street, etc., where, by other instructions, the jury were properly instructed as to the law of the road and care required in using the left-hand side of the street, and on the subject of contributory negligence by pedestrians.

SAME. In such a case, an instruction that plaintiff could not recover, if it was found that he attempted to run across the street in front of a moving street car, and in so doing failed to use his faculties for his own safety and collided with defendant's car, is not error, when taken in connection with other proper instructions defining contributory negligence.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 24, 1917, upon the verdict of a jury rendered in favor of the defendants, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Vanderveer & Cummings, for appellant.

Kerr & McCord and *Peters & Powell*, for respondents.

[1]Reported in 172 Pac. 1171.

WEBSTER, J.—Appellant brought this action to recover damages for injuries sustained by him on account of being struck by an automobile owned and operated by respondents. The facts are these: The appellant, while engaged in delivering milk in the vicinity of Bellevue avenue and Thomas street, in the city of Seattle, left his milk wagon on the east side of Bellevue avenue at a point about seventy feet south of the intersection of Bellevue avenue with Thomas street. Bellevue avenue runs north and south; Thomas street east and west, the former being thirty-six feet in width from curb to curb. A street car track extends along Bellevue avenue, the same being located west of the center line of the street, there being a distance of only ten and one-half feet between the west rail of the car track and the curb on the west side of Bellevue avenue, while the distance on the east side of the car track to the curb on the east side of Bellevue avenue is twenty and one-half feet. Prior to the happening of the accident upon which the action is based, a street car going south on Bellevue avenue crossed Thomas street and slowed down for the purpose of stopping south of the street intersection. An automobile driven by respondents followed in the rear of the street car to the point where the car began to stop after crossing Thomas street, when the driver of the automobile passed to the left of the street car to avoid the passengers who were alighting from the street car on the west side of Bellevue avenue. There were no vehicles or objects in view on the east side of the street when the automobile attempted to pass on the left-hand side of the street car. As the street car slowed down after crossing Thomas street, the appellant left the sidewalk on the west side of Bellevue avenue and started to cross in front of the moving street car, intending to reach his delivery wagon on the opposite side of Bellevue avenue. Be-

fore leaving the sidewalk, he went south a distance of more than twenty-five feet, and after entering the street, followed along the course of and beside the moving street car, passing over the car tracks in front of the street car before it stopped. The point where appellant crossed the car tracks was from sixty to seventy feet south of the street intersection and from four to six feet in front of the moving street car. He says he was in a hurry, "trotting" to and around the front end of the street car, looking ahead and toward the south. He frankly admits that he never looked toward the north, or in the direction of the approaching automobile, from the time he left the west sidewalk on Bellevue avenue. After he had passed in front of the street car and had proceeded six or seven feet beyond the car tracks, he was struck and injured by respondents' automobile.

At the close of the plaintiff's case, defendants' motion for nonsuit was overruled, and thereafter the cause was submitted to the jury, which returned a verdict for the defendants. From a judgment entered thereon, the plaintiff has appealed. The only errors assigned relate to the refusal of the court to give two instructions requested by appellant, and the giving of one instruction which was excepted to by appellant. The instructions requested and not given were as follows:

"I instruct you, members of the jury, that a pedestrian in crossing a city street is not bound to stop, look and listen, but is bound only to use ordinary care, and what is ordinary care, depends upon the circumstances of the case."

"I instruct you that the plaintiff was not bound, as a matter of law, to anticipate an automobile or other vehicle coming south on the left-hand side of the street. There are certain rules, or laws of the road, reliance upon which becomes instinctive, and one of these is

that vehicles will run upon the right-hand side of the street. If, therefore, you should find the fact to be that the plaintiff in this case passed in front of the street car and onto the east side of Bellevue avenue, without first looking to the left for an approaching vehicle, then I instruct you the plaintiff would not, as a matter of law, be guilty of negligence; but whether or not the plaintiff was, in fact guilty of negligence in so doing would be for you to determine from all of the circumstances of the case."

It is urged by appellant that the failure to give these requested instructions constitutes reversible error under the rule laid down by this court in *Mickelson v. Fischer,* 81 Wash. 423, 142 Pac. 1160, and cases there cited. In that case, instructions similar to the requests made by appellant in this case were given, which was held not error as applied to the facts there presented. But it does not follow that the refusal to give the instructions requested is reversible error, where the law as applied to the facts of this case was elsewhere properly defined in the court's instructions to the jury.

With respect to the use of the street by defendants' automobile and the duty arising therefrom, the jury were instructed as follows:

"I instruct you that there is, arising from usage and custom, what is known as the law of the road, which requires the driver of automobiles traveling upon a continuously used street or highway to keep upon the right-hand side of such street or highway in the direction in which they are traveling. While this rule is not inflexible, and one may use what is to him the left-hand side of the road, he cannot do so if his conduct in so doing will be a source of danger to others; and if he does use the left-hand side of the road he must always exercise a degree of care commensurate with his position."

And with respect to the duty devolving upon appellant, the court gave the following instruction which is assigned as error by the appellant:

"You are instructed that it is the duty of a pedestrian, in attempting to cross a street in front of a street car, and at a point other than the street intersection, to reasonably exercise for his personal safety the faculties with which he is endowed by nature for self preservation, and if he fails to do so and is by reason of such failure injured, he has at least contributed to his injury by his own negligence and cannot legally recover for such injuries. As applied to this case, if you find from the evidence that plaintiff attempted to run across the street in front of a moving street car, and that in so doing he failed and neglected to use his faculties for his own safety, and that by reason thereof he collided with defendants' car and was injured, I instruct you he cannot recover for injuries so received."

And the following instruction, upon which error is not based:

"You are further instructed that the defendants have set up the defense of contributory negligence, and it will devolve upon them to prove the same, if they are to prevail thereunder, by a preponderance of the evidence, as that term has been hereinbefore defined. A person is guilty of contributory negligence when he does something which an ordinarily careful person would not do under the circumstances and conditions of a given case, or when he fails to take such precautions for his own safety as an ordinarily prudent person would take under the same circumstances and conditions. And it makes no difference in this connection whether you find the defendants were guilty of negligence as charged in the complaint, if you find the plaintiff was also guilty of negligence. Therefore, if you should be satisfied by a preponderance of the evidence that the injury to the plaintiff, Julius Johnson, if any, was caused through the negligence of the defendants' chauffeur, as set forth in the complaint, but that the plaintiff, Julius Johnson, failed to use such care as a sensible, prudent person would have used under like circumstances, and that plaintiff failed to take such precaution for his own safety as an ordinarily prudent person would have taken under like or similar circum-

stances, and that his negligence and carelessness in failing to take such reasonable precautions for his own safety was the proximate cause of, and that he himself contributed to such injury and was thus guilty of contributory negligence on his part, notwithstanding the negligence of the defendants, if any is shown, that would be a defense and your verdict must be for the defendants."

The giving of the instruction complained of was not error, when considered in connection with the other instructions defining contributory negligence and the law as applicable to the facts of the case. It is based upon appellant's own testimony wherein he admits that he hurried into the street, approximately sixty feet from the street intersection, ran or "trotted" across the car tracks only a few feet in front of a moving street car without looking in the direction from which the automobile was approaching. Under such circumstances we are of the opinion that the instructions given were as fair to the plaintiff as the facts would justify, and that the failure to give the requested instructions, under the facts of the case, taking into consideration the width of the street, the location of the car tracks thereon, the traffic conditions disclosed by the evidence, and the conduct of the plaintiff at the time he received the injury, was not error requiring a reversal of the judgment.

Moreover, assuming the facts to be as stated by the appellant, it is difficult to conceive how any other verdict could be sustained. The judgment is therefore affirmed.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14413. Department One. May 9, 1918.]

In the Matter of the Estate of MARTHA KING. MARIE SCHRADER, *Appellant*, v. CHARLES S. BUFFUM, *as Executor etc., Respondent.*[1]

APPEAL — REVIEW — FINDINGS OF FACT — NECESSITY. Findings of fact and conclusions of law are not necessary to sustain a judgment in a proceeding to compel an executor to act upon a claim against the estate, as the same is either of equitable cognizance or a special proceeding of a mandatory nature.

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—BURDEN OF PROOF. Upon an issue as to whether a claim had been duly presented to an executor, the burden of proof is upon the claimant.

SAME—CLAIMS—PRESENTATION—EVIDENCE—SUFFICIENCY. A finding that a claim was not presented to an executor is sustained, where the story of plaintiff's presentation of the claim while walking on the street to the executor's home, without exacting any receipt, is flatly contradicted and without corroboration, while the executor's testimony was corroborated in some respects, and plaintiff made no inquiry as to the matter for three years, and not until sued by the executor.

APPEAL—REVIEW—ASSIGNMENT OF ERROR. The denial of a new trial, asked merely to review the decision of the trial court on the evidence already considered, furnishes no basis for the predication of error.

Appeal from an order of the superior court for Walla Walla county, Mills, J., entered March 31, 1917, dismissing proceedings in probate, after a hearing before the court. Affirmed.

Evans & Watson and *Hartman, Nafe & Hartman*, for appellant.

Rader & Barker, for respondent.

FULLERTON, J.—The appellant filed a petition in the superior court of Walla Walla county in a probate proceeding asking for an order requiring the respondent,

[1]Reported in 172 Pac. 1167.

as executor of the estate of Martha King, deceased, to show cause why her claim against the estate named should not be acted upon and either allowed or rejected. Issue was taken by the executor upon the allegations of the petition and a hearing had, resulting in an order dismissing the proceeding. The petitioner appeals, assigning that the court erred in failing to make and file findings of fact and conclusions of law; that it erred in holding that the burden of proof was on the petitioner; that it erred in holding that the petitioner had not sustained her case by a preponderance of the evidence and in dismissing the proceeding; and that it erred in denying the petitioner's motion for a new trial.

We find no error in the failure of the court to make findings and conclusions. The action was not one to enforce or recover upon a claim which had been rejected by the executor, which might be triable as an action at law before a jury, but was a proceeding to compel action on a matter on which she contended no action had been taken by the executor. It was, therefore, either an action of equitable cognizance or a special proceeding mandatory in its nature, in neither of which are findings of fact or conclusions of law necessary to sustain the order or judgment entered.

The second objection is also without merit. The issue on which the case hinged was whether or not the petitioner had presented her claim to the executor, and clearly the burden of establishing a due presentation, when the fact was denied, was upon the petitioner. This burden was not changed by the form of the proceeding. It was a fact necessary to be established before any inquiry as to whether the claim had been acted upon could be entered into, and since the petitioner was bound to assert its due presentation, the burden was upon him to prove it. Merely because the petitioner assumed in her petition that the claim had been

regularly presented and did not directly allege the fact, the rule is not changed. The assumption was in itself an assertion, and, when the executor put the fact in issue, the burden still rested where it is rested by legal rules.

On the principal question, whether the claim was in fact presented, we can discover no reason for a reversal of the conclusion of the trial judge. The circumstances under which the claim is asserted to have been presented, as testified to by the only witness of the petitioner testifying directly upon the matter, are somewhat out of the ordinary. The claimant resides in the city of Seattle, while the executor resides in the city of Walla Walla, the place where the court in which the estate was in process of administration is held. The witness testified that the claim was prepared in the city of Seattle, and that he carried it from that city across the state to the city of Walla Walla and presented it to the executor in person, making the trip solely for that purpose. Yet he also testified that, notwithstanding this extreme caution, he handed the claim to the executor while walking on the streets of the city of Walla Walla going to the executor's home for lunch, not at the place where the published notice to creditors required claims against the estate to be presented; that no one else was present at the time; that he exacted no receipt for the claim, and made no request for notice of the executor's action upon it. It is in evidence, moreover, that no inquiry was made by the petitioner, or by any one on her behalf, until some three years after that time, and that her activity was then aroused by an action brought against her by the executor upon a promissory note she had executed to the decedent in her lifetime. On the other hand, the executor emphatically denies that the claim was presented to him at the place mentioned, or elsewhere. He tes-

tified that the witness claiming to have presented the claim was in Walla Walla at about the time mentioned and lunched with him at his home, but testified that they did not walk to the home, but rode there in an automobile. He also testified that the witness at the time accounted for his presence in Walla Walla in another manner; stated that he had business which had brought him to that side of the state and took advantage of his presence there to perform an errand at Walla Walla not connected with the estate. The executor is corroborated as to some of the details of his version of the visit by other witnesses, while the petitioner's witness is practically alone.

While the foregoing is but an outline of the evidence, it seems to us sufficient to sustain the conclusion of the primary judge of the facts. As we have often said, the trial judge has the advantage of having the witnesses before him and is thus in a much better position than are we, who must gather the facts from the typewritten record, to determine wherein lies the truth in conflicting testimony. Following our established rule in such cases, namely, that we will not reverse the conclusion of the trial judge on conflicting evidence unless we are able to find that the evidence preponderates against the conclusion, we have no warrant to interfere with the judgment before us.

The motion for a new trial set up no new matter. By it the petitioner but sought another review by the trial judge of the evidence then in the record and on which he had reached his original conclusion. Contrary to the intimation contained in the petitioner's brief, the record does not disclose that the judge declined to hear it for insufficient technical reasons. On the contrary, it appears that it was heard on its merits and was denied because the judge was not convinced that his original conclusion was wrong. The denial of

the motion, therefore, furnished no basis for the predication of error.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14417. Department One. May 9, 1918.]

In the Matter of the Estate of WILLIAM P. NICHOLS. JESSIE F. MCDONALD, *Legatee etc., Appellant,* v. E. N. IMUS, *as Executor etc., Respondent.*[1]

WILLS — CONSTRUCTION — CONDITIONS PRECEDENT — RESTRAINT OF MARRIAGE. Since a will speaks from the date of the testator's death, a bequest to a legatee provided she is legally divorced from her husband and still bears his name, is not a restraint of marriage or an inducement to obtain a divorce, since it imposes only a condition precedent and not a condition subsequent; and if she was not divorced at the date of testator's death, the legacy lapsed, notwithstanding a subsequent divorce.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered February 19, 1917, in favor of the defendant, upon an agreed statement of facts, in an action to construe a will. Affirmed.

Roche & Onstine, for appellant.

Skuse & Morrill, for respondent.

FULLERTON, J.—This is a proceeding instituted in the superior court of Spokane county to obtain a construction of a clause in the will of William P. Nichols, deceased. The case was heard in the lower court, and is before us, upon an agreed statement of facts. The statement summarized shows the following:

(1) That William P. Nichols died on October 15, 1915, leaving estate in Spokane county, consisting of

[1]Reported in 172 Pac. 1146.

real and personal property, of the approximate value of $22,000.

(2) That he left a will, bearing the date of November 6, 1912, which, among others, contained the following bequest: "I also give and bequeath to Jessie F. McDonald, of Spokane, provided she is legally divorced from her husband, A. S. McDonald, and still bears his name, the sum of one thousand dollars;"

(3) That the will was admitted to probate in Spokane county on October 26, 1915; that one E. N. Imus was named in the will as executor thereof and duly confirmed by the court as such; that the estate has been closed but not distributed, and that there now remain in the hands of the executor sufficient funds to pay all the legacies provided for in the will, including the legacy to the legatee Jessie F. McDonald.

(5) That, after the death of the testator, the legatee obtained a divorce from A. C. McDonald, and has not since remarried, and now bears the name of Jessie F. McDonald.

(6) That the testator, at the time of the execution of his will and at the time of his death, knew that the legatee was not divorced.

The trial court, on the facts stipulated, held that the legatee, because she did not occupy the status defined in the will, was not competent to take thereunder, and adjudged the legacy to have lapsed. From this conclusion, the legatee has appealed.

It is the contention of appellant's learned counsel that the condition imposed on the taking effect of the legacy is one tending to induce the separation of husband and wife and to operate in restraint of marriage, and is thus void as against public policy; contending further that, if the condition be void, the legatee takes under the will as if no condition had been imposed. But without considering the effect of the condition

were it such as the contention implies, we cannot conclude that it is capable of the construction put upon it. A will speaks as of the date of the testator's death. Until that event occurs, it is ambulatory and subject to the control of the testator. *Strand v. Stewart,* 51 Wash. 685, 99 Pac. 1027. The condition here imposed is plainly a condition precedent. It merely provides that, if the legatee, at the time the will goes into effect, has a certain defined status; that is to say, if she is then legally divorced from her husband and has not remarried, she may take the legacy willed her, otherwise not. Such a condition is not an inducement to obtain a divorce, nor is it in restraint of marriage. A condition to have such an effect must be a condition subsequent; it must provide for a future separation and operate as a restraint upon subsequent marriage. It is almost too evident to be capable of demonstration that this condition does neither of these things. Since the will speaks as of the time of the death of the testator, no subsequent divorce could avail the legatee; nor if she had received the legacy, could any subsequent marriage avoid it.

The reasonableness of the condition imposed is not an inquiry for the courts. The property to be given away was the property of the testator. He was privileged to dispose of it in any lawful manner. And when his wishes are ascertained and found to be legal, it is the duty of the courts, in justice to his memory, to carry his wishes into effect.

The order appealed from is affirmed.

ELLIS, C. J., WEBSTER, MAIN, and PARKER, JJ., concur.

[No. 14434. Department Two. May 9, 1918.]

SMITH SAND & GRAVEL COMPANY, *Appellant*, v. D. C. CORBIN, *Respondent*.[1]

PLEADING—AMENDMENTS — AFTER RETRIAL — COUNTERCLAIM AFTER ADMISSIONS. Under Rem. Code, § 273, permitting a defendant to set forth as many defenses and counterclaims as he may have, and Id., § 303, authorizing the court to allow amendments, it is discretionary to allow amendments to an answer, upon retrial after remand from the supreme court.

SAME—AMENDMENTS — NEW DEFENSE — CONSISTENCY — CONSTRUCTION. An amendment to an answer setting up a counterclaim for abandonment and breach of contract, not made on the former trials, is not inconsistent with the original answer admitting a specified sum as due for work done under the contract, and offering to submit to judgment therefor; since the amendment contained no denials of the original admissions.

DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES—COST OF PROCURING PERFORMANCE. Where, upon breach of a contract for the removal of rock, the owner made a new contract on the same terms with a third party, who refused to carry it out because he was losing money, the owner had an election to hold the third party for damages or to make a new contract with him agreeing to pay him a greater sum; and having elected the latter, his measure of damages for the breach of the original contract was the reasonable and necessary expense of procuring completion of the work by another, which was the sum paid the third party, where it appears from the evidence that it was not unreasonably high and was a reasonable price.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 25, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

O. C. Moore, for appellant.

Allen, Winston & Allen, for respondent.

CHADWICK, J. — The appellant began an action against respondent in the year 1912 to recover dam-

[1]Reported in 173 Pac. 16.

ages for breach of contract, setting forth in its complaint three causes of action. In the course of two trials in the lower court and two appeals to this court, all but the first cause of action was eliminated. On the third trial, the respondent was allowed by the trial court to amend his answer by setting up a counterclaim as an additional defense to the appellant's cause of action. A trial before a jury resulted in a verdict in favor of the respondent on his counterclaim in the sum of $1,330.13. From a judgment thereon, the appellant prosecutes this appeal.

The first contention of the appellant is, the cause having been twice tried and twice heard on appeal on *pro tanto* admissions as to the justice of appellant's claim, the respondent was estopped to amend his answer for the purpose of a third trial. The prior appeals did not involve any question upon the first cause of action and defenses thereto, hence we are not controlled by the doctrine of "law of the case." Nothing more is involved than the right to amend a pleading upon a retrial so as to present a new defense. The appellant founded his cause of action on the respondent's breach of a written contract under which appellant was to be paid fifty cents per cubic yard for the excavation and removal of rock from certain land owned by the respondent, payments to be made in monthly installments of ninety per cent as the work progressed, and ten per cent to be retained until final settlement. The appellant began the removal of the rock about August 1, 1909, but the work not proceeding with the diligence desired by respondent, he gave various notices, between October 3, 1910, and March 24, 1911, to appellant to remove his equipment, charging the contract had come to an end by lapse of time. The contract itself set no time for performance and was, accordingly, subject to the rule of reasonable time. The respondent having

taken possession of the land and prevented the appellant from carrying on its contract, the appellant brought an action to recover damages for its alleged breach, setting up that it had actually earned $4,468.40, on which it had been paid $1,279.80, leaving a balance due for rock theretofore excavated in the sum of $3,188.60. The respondent admitted the sum of $1,352.70 to be due the appellant and offered to submit to a judgment for that amount.

After the cause had been twice tried on this issue, and remanded for new trial after appeal by reasons of errors on other phases of the case, the respondent interposed a counterclaim, setting up that he had been compelled to employ another contractor to do the work at an expenditure of $9,133.33, for which he demanded judgment against appellant. The appellant argues that the act of the respondent in going to trial, admitting in the answer indebtedness on his part, estops him from setting up a new defense on a retrial which virtually nullifies his prior admissions. While it is the rule that an answer containing admissions is not amendable so as to deny the admissions, such a question is not presented here. The amendment interposed by the respondent contains no denial of the admissions in his former answer, but merely sets up a counterclaim which, to the extent that it might be established, would operate by way of set-off, or possibly by way of judgment over, as against any right of recovery established by appellant on its cause of action.

Our statute (Rem. Code, § 273), permits a defendant to "set forth as many defenses and counterclaims as he may have," whether legal or equitable; and Id., § 303, authorizes the court to allow amendments to pleadings, a matter that we have repeatedly held as within the discretion of the court, whose action will be set aside only upon a showing of abuse of discretion.

That such amendments are permissible on a retrial upon remand from the supreme court is a well recognized rule in this state. *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359; *Interstate Savings & Loan Ass'n v. Knapp*, 20 Wash. 225, 55 Pac. 48, 931. The defenses set up are not objectionable as being inconsistent, but are such as the law allows. The only inconsistency was the action of the respondent in proceeding to trial on one defense when he had another that he might have interposed at the same time. Whether the omission of this defense was due to motive or oversight is immaterial. There was no element of estoppel which would preclude his asserting any valid defense at any stage of the proceedings, provided due notice and opportunity to meet it were given to the adverse party.

The next contention of appellant is addressed to the alleged error of the court in admitting certain evidence in support of the respondent's counterclaim.

The record shows that, after the respondent had rescinded his contract with appellant because of the latter's breach, he entered into a new contract with one Margolius to complete the work remaining unperformed by the appellant. The Margolius contract was a written one, stipulating for the same rate of pay as provided by the contract with the appellant. Margolius entered upon the performance of the contract, but later threatened to abandon it because he was losing money. The respondent thereupon made a new arrangement with Margolius to continue the work and agreed to pay him the actual cost. The rock removed by Margolius, according to the original contract price of fifty cents per cubic yard, would have been worth $6,450.50, but the amount paid by respondent to Margolius under the terms of their altered contract was $9,133.33, being $2,682.83 more than it would have cost

under the contract between appellant and respondent.

The appellant claims that the respondent had a valid, enforceable contract with Margolius for the sum of $6,450.50, that any payment in excess of that sum was a voluntary payment, hence such excess payment was not chargeable as a natural consequence of appellant's breach of contract, and the admission of such excess in evidence and the submission of that item to the jury was error. In arriving at their verdict the jury took into consideration this excess payment of $2,682.83 more than appellant would have been entitled to for the completion of its contract, deducted therefrom the sum of $1,352.70, which the respondent had admitted as justly due the appellant, leaving a balance of $1,330.13, for which they rendered their verdict. If, under the law, the excess payment of $2,682.83 over the contract price was a voluntary one, its submission to the jury was erroneous. The only damages recoverable on a breach of contract are such as arise directly and unavoidably from the breach. Under the original contract between appellant and respondent the completion of the work as contracted for would have cost the respondent $6,450.50 in addition to the sum previously earned by the appellant. The contract between the respondent and Margolius called for a continuance of the work at the same price. Margolius refused to carry out the contract because it was a losing one to him. The respondent had his remedy on the contract of the third party to hold him for damages of the same character as his remedy against appellant. But respondent elected to make a new contract with Margolius, promising to pay him a greater sum. As between these two it was a valid contract, as recognized by our decision in *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455. But what effect would such a contract, though valid and

binding on the respondent, have as against the rights of the appellant to have his liability for damages minimized to such amount as were necessarily expended by the respondent as a natural and probable consequence of appellant's breach? The respondent's measure of damages for appellant's breach of contract through failure to perform was the reasonable and necessary expense of procuring completion of the work by another. The rule is stated in Sutherland on Damages (4th ed.), § 91, as follows:

"On the failure of a contractor to finish his contract the employer may cause it to be done by others and the reasonable sum required to be paid therefor may be recovered of the delinquent party. . . . A party to a contract which has been broken by the other has a right to fulfill it for himself, as nearly as may be, but he must not do this unreasonably as regards the other party, nor extravagantly, but he may expend such sum as will give him what he was entitled to under his contract though that be more than the price for which the contractor was to have done the work."

As to what would be evidence of the reasonable value of completing unfinished work, the rule is stated in Sedgwick on Damages (9th ed.), § 618, as follows:

"If, however, the completion of the contract is actually secured by the plaintiff, the amount paid by him for such completion is, if reasonable, the best evidence of the value or cost of performance, and it is therefore *prima facie* to be taken as the value of performance; but it is always open to the defendant to show that the amount paid was greater than reasonable."

See, also, *National Contracting Co. v. Hudson River Water Power Co.*, 118 App. Div. 665, 103 N. Y. Supp. 641; *Anderson v. Nordstrom*, 60 Minn. 231, 61 N. W. 1132; *Nichols v. Superior*, 109 Wis. 643, 85 N. W. 428.

If the sum expended by the respondent above the original contract price was reasonable and necessary

under the circumstances, he would be entitled to counterclaim for such excessive expenditure. There is no direct evidence in the record as to whether such expenditure was or was not reasonable, other than that of expert witnesses that such work was worth from seventy to ninety cents per cubic yard. The price paid Margolius was about seventy-one cents. While some presumption arises that fifty cents per cubic yard was a reasonable price for removing the rock, from the fact that two contracts at that price had been entered into, there is a countervailing presumption arising from the fact that the substituted contractor threatened to abandon the work for inadequacy of compensation and was induced to finish it on the respondent's promise to reimburse him for his actual expenses whatever they should amount to. There was some evidence that the appellant contemplated realizing a profit upon a sale of crushed rock in addition to the price obtained for the actual work of removal. The fact that the appellant could afford to do the work for fifty cents per cubic yard because of an opportunity for a side profit lends color to the claim of Margolius that fifty cents per yard was not an adequate price for the removal of the rock, and justifies the agreement between him and respondent for an increased payment. That this increased payment was unreasonably high does not appear from the record, but rather it appears from what evidence there was on the subject to have been a reasonable price. In such event, the total price paid by respondent to Margolius was a proper offset against any claim of appellant, irrespective of any question of the payment having been made voluntarily or under duress.

There was conflicting evidence on all issues in the action, and these issues having been submitted to the jury on proper instructions, the verdict is conclusive.

We find no merit in the exceptions to the giving and refusal of instructions.

The only question remaining is as to whether any of the testimony objected to by appellant was erroneously admitted. A reading of the abstract of record satisfies us that no reversible error was committed in the admission of the testimony to which exceptions were taken by the appellant. The judgment of the trial court is affirmed.

ELLIS, C. J., HOLCOMB, WEBSTER, and MOUNT, JJ., concur.

[No. 14502. Department One. May 9, 1918.]

N. A. NELSON *et al.*, *Appellants*, v. W. H. DAVIS *et al.*, *Respondents*.[1]

FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM—DESCRIPTION—SUFFICIENCY. An offer to exchange "¾ of an acre on Bridge Street" in a certain city fails to satisfy the statute of frauds in that it contains no sufficient description of the land.

ESCROWS—AGREEMENT—SUFFICIENCY—RETAINING CONTROL OF DEED. A valid escrow agreement is not shown by the fact that parties contemplating an exchange of properties executed deeds and left them with the agent as a matter of convenience pending an inspection and final decision as to whether an offer made would be accepted, where the depositor's deed was not to be delivered until the agent was advised of such acceptance; since the depositor did not part with control of the deed.

SAME—PART PERFORMANCE—TAKING POSSESSION. Part performance, taking the case out of the operation of the statute of frauds, is not shown by the fact that the parties were given the key for the purpose of inspection, and remained only a reasonable time for that purpose.

EXCHANGE OF PROPERTY—IMPROVEMENTS—REIMBURSEMENT. Parties given permissive possession pending inspection and acceptance of an offer to exchange properties, which failed of consummation, ac-

[1]Reported in 172 Pac. 1178.

quire no rights by voluntary improvements and payment of interest, especially where they deprived the owners of the use of their property for a long time.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered March 15, 1917, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Ben F. Tweedy and *Elmer E. Halsey,* for appellants.

J. Webster Hancox and *E. J. Doyle,* for respondents.

PARKER, J.—The plaintiffs, Nelson and wife, seek delivery of a deed which they claim was deposited for them in escrow with the defendant Wallace by the defendants Maxum and wife, which deed was signed and acknowledged by Maxum and wife, purporting to convey to Nelson and wife land in Clarkston, Asotin county, in this state. The plaintiffs also seek to quiet title to the land in themselves as against the claims of the defendants Davis and wife and the interveners, Witherby and wife, grantees of Maxum and wife. Trial in the superior court for Asotin county resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed to this court.

The contentions of counsel for appellants are, in substance, that the deed in question was deposited for them by the Maxums in escrow with Wallace; that the conditions of the escrow agreement have been fully performed, entitling them to delivery of the deed; and that the facts shown are such as to render the defendant and interveners, grantees of the Maxums, purchasers with notice of appellants' rights in the premises. The contentions of counsel for respondents are, in substance, that there never was any valid, binding contract for the conveyance of the land, nor any valid and binding escrow agreement as claimed by appel-

lants, and that the grantees of the Maxums are, in any event, innocent purchasers for value. Our conclusion renders it necessary for us to notice only the question of appellants' claim of right to the delivery of the deed as against the defendants Maxum.

Early in June, 1915, negotiations were commenced looking to the exchange of the land of the Maxums, situated in Clarkston, Asotin county, in this state, for a lot and personal property consisting of a bakery plant thereon of the Nelsons, situated in Wendell, Gooding county, Idaho. These negotiations were conducted by the husbands, assisted by the defendant Wallace, a real estate agent at Lewiston, Idaho, and resulted in the signing of a writing as follows:

"Offer to Exchange.

"I hereby offer to exchange my property described as follows: One lot and store building in Wenda(e)ll, Idaho, in the county of Gooding, state of Idaho, for the property of Mr. L. V. Maxum, described as follows: ¾ of an acre on Bridge street in Clarkston, in the county of Asotin, state of Washington. Each party is to furnish an abstract showing good title and execute a warranty deed or contract for warranty deed. Also each party is to have a reasonable time for furnishing an abstract, examination of title, and for closing the deal. Also each party acknowledges the receipt of $1 from the other as part payment on these properties.

"This proposition is to be accepted by Mr. L. V. Maxum within eight days from this 9th day of June, 1915. (Signed) N. A. Nelson.

"I hereby accept the above proposition this 9th day of June, 1915, providing the statement from the bank at Wenda(e)ll, Idaho, is satisfactory and according to the description given me by Mr. N. A. Nelson.

"(Signed) L. V. Maxum."

The Nelsons had seen and examined the Clarkston property, which is situated a short distance from Lewiston, while the Maxums were wholly unacquainted

with the Wendell property, which is situated in Southern Idaho, a long distance from Lewiston. There was no attempt to make any written contract relating to the personal property to be exchanged with the Wendell lot, though Nelson made a rough statement in writing in a separate paper touching the nature of the personal property. The bank at Wendell was communicated with by mail, bringing an answer which proved unsatisfactory to the Maxums. This would have put an end to the trade had no further negotiations been had. However, Nelson insisted on the Maxums going to Wendell and examining the property for themselves. It was then orally agreed that the parties should sign and acknowledge deeds to their respective properties and leave the deeds with Wallace to be delivered by him, should the Maxums, after going to Wendell and examining the property there and finding it satisfactory, write to Wallace that they were willing to consummate the exchange and authorize him to deliver their deed to the Nelsons upon receiving from them their deed for the Wendell property. Deeds were signed, acknowledged and left with Wallace accordingly. Maxum then started overland by team and wagon to Wendell, his wife preceding him by train. About the time of the departure of the Maxums, the Nelsons moved onto the Clarkston property. Whether it was with the consent of the Muxums is a matter of dispute between them, but that it was not in consummation of the exchange, we think it quite clear from the evidence. When the Maxums arrived at Wendell, they immediately examined the Nelson property there, and being dissatisfied with it, promptly wrote to Wallace advising him of that fact, in effect declining to complete the exchange, and warning him not to deliver their deed to the Nelsons. It is apparent that the Nelsons

were promptly advised of this decision on the part of the Maxums.

Looking to the agreement of June 9, 1915, as evidenced by the writing above quoted, it seems plainly to fall far short of satisfying our statute of frauds as a contract to convey real property, in that no sufficient description of any real property appears therein. *Rogers v. Lippy,* 99 Wash. 312, 169 Pac. 858; *Nance v. Valentine,* 99 Wash. 323, 169 Pac. 862. It also seems plain that this writing does not evidence the meeting of the minds of the parties except as to matters merely preliminary to an ultimate exchange of the properties. It also seems plain from the conceded facts that this writing in no event evidences the entire agreement between the parties, since it makes no mention of any personal property, which plainly was contemplated to become part of the property to be exchanged. So whatever the agreement was, both as to the exchange of the properties and as to the leaving of the deeds with Wallace, claimed by the Nelsons to have been in pursuance of an escrow agreement, it is, in law, only an oral agreement. 13 C. J. 246.

Conceding, for argument's sake, that an escrow agreement for the delivery of a deed conveying real property may rest in parol where there is no valid written contract for the conveyance of real property, which, however, seems doubtful *(Nichols v. Oppermann,* 6 Wash. 618, 34 Pac. 162; *Manning v. Foster,* 49 Wash. 541, 96 Pac. 233, 126 Am. St. 876, 18 L. R. A. (N. S.) 337; *King v. Upper,* 57 Wash. 130, 106 Pac. 612, 1135, 31 L. R. A. (N. S.) 606), we are of the opinion that the evidence does not warrant the conclusion that there was any meeting of the minds of the Nelsons and the Maxums constituting in law an escrow agreement. We see nothing in the understanding arrived at between

the parties when the deeds were left with Wallace, other than that the deeds were left with him as a mere matter of convenience pending the final decision of the Maxums as to whether they would consummate the contemplated exchange, they being privileged to refuse to consummate it upon the inspection of the Wendell property, which at that time, as we have noticed, they had never seen. In other words, the Maxums did not, in placing their deed in the hands of Wallace, part with the control of it with a view of having it delivered to the Nelsons upon their performing some specified, agreed condition entitling them to have it delivered. The law of escrow agreements is well stated by the learned editors in 10 R. C. L. 626 as follows:

"Where the possession of the depositary is subject to the control of the depositor, an instrument cannot be said to be delivered, and it is not an escrow. While as will be seen, the depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument an escrow it is essential that the deposit of it should be in the meantime irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it. In case the deposit is made in furtherance of a contract between the parties, the contract must be so nearly complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import."

This deed was not beyond the recall of the Maxums. Its delivery was not dependent upon the happening of an event beyond the control of the Maxums, but its delivery was dependent wholly upon the determination of the Maxums as to whether they would complete the exchange after their inspection of the Wendell property.

Our recent decision in *Rhines v. Young*, 97 Wash. 437, 166 Pac. 642, while not dealing with an escrow agreement, supports this conclusion. Counsel for appellants place some reliance upon our decision in *Bahrs v. Runkle*, 79 Wash. 45, 139 Pac. 637. In that case, while the plaintiff was attempting to enforce an escrow agreement, there was no question as to the validity or binding force of the escrow agreement as such, but the real controversy was over the question of rescission of the entire contract, including the escrow agreement, upon the ground of fraud.

Some contention is made in appellants' behalf rested upon the theory that the Nelsons took possession of the Clarkston property and the Maxums took possession of the Wendell property. We think the record does not warrant the conclusion that the Nelsons took possession of the Clarkston land with any understanding whatever on the part of any of the parties that the taking of such possession was in consummation of the exchange. Their possession was, in no event, anything more than merely permissive on the part of the Maxums, with the understanding that such possession was to be surrendered should the Maxums elect not to make the exchange. We think the Maxums did not take possession of the Wendell property in the sense that their acts could be construed as a consummation of the trade. It does appear that they obtained from the agent of the Nelsons at Wendell the key to the property and went upon the premises, but only for such reasonable time as would enable them to properly inspect them and reach a decision as to whether they would consummate the trade. Their acts in this respect covered a very short period of time and, we think, plainly were not such as evidenced an intent on their part to retain possession in consummation of the exchange.

Some contention is made in appellants' behalf rested upon the fact that the Nelsons, after going upon the Clarkston land, made some improvements thereon, and also paid an installment of interest upon a mortgage thereon. We are convinced, however, that this was wholly voluntary on their part, and that they were not induced to make any such improvements or payment by any act of the Maxums. This was not an issue upon the trial, in any event, and if it should be considered as having been an issue, we are satisfied that good conscience and equity would not require the Maxums to reimburse the Nelsons therefor, in view of the long time that the Nelsons have remained in possession depriving the Maxums of the use of the land.

Respondents have moved to dismiss the appeal because the appellants have not prepared a proper abstract, the evidence covering somewhat more than one hundred pages. While we think the form of the abstract as prepared by counsel for appellants is subject to some criticism, we have concluded to not dismiss the appeal, but dispose of the case on the merits, which leads to the same result in so far as the ultimate determination of the controversy is concerned.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ., concur.

[No. 14620. Department One. May 9, 1918.]

O. C. OLSEN, *Appellant*, v. WILLIAM H. HAGAN *et al.*, *as Executors etc., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS—CLAIMS—CONTRACT FOR SERVICES—EVIDENCE—SUFFICIENCY. A decedent's promise to pay a foster son for past services is supported by a sufficient consideration, where she had promised her dying husband to make the payment, she had taken her husband's separate and community estate burdened with the promise, and there was a moral obligation on her part to carry it out.

SAME—CLAIMS—WAIVER. The surrender of notes to a decedent in her lifetime does not constitute a waiver of a claim against the estate, where no equivalent was given and the payee was justified in assuming that decedent would subsequently provide for the indebtedness by will or otherwise.

WILLS—CONSTRUCTION—PAYMENT OF DEBT BY LEGACY—PRESUMPTION. There is no presumption that a bequest is in payment of a debt due the legatee, especially where it was less than the debt; and even though the creditor was named as a residuary legatee, where the residuum is uncertain in amount or time of payment.

EXECUTORS AND ADMINISTRATORS—CLAIMS — JOINDER — NECESSITY. The presentation of a claim for moneys expended does not bar the filing, within the time limited by law, of another claim for services rendered, where the two claims were upon separate accounts for different subject-matters; since they need not be joined.

ASSIGNMENTS—RIGHT TO SUE—REAL PARTY IN INTEREST. Under Rem. Code, § 191, providing that an assignee may maintain an action notwithstanding the assignor may have an interest in the thing assigned, an assignee of a chose in action for the purpose of collection only may maintain an action in his own name as the real party in interest.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 23, 1917, upon findings in favor of the defendants, in an action to enforce a claim against an estate, tried to the court. Reversed.

F. E. Langford and *Lucius G. Nash*, for appellant.

Peacock & Ludden, for respondents.

[1]Reported in 172 Pac. 1173.

FULLERTON, J.—Marion C. Wharton died on June 15, 1915, leaving a last will in which the respondents were named as executors. One of the executors, Thomas C. Hooker, presented a claim against the estate in the sum of $16,670 for work, labor and services performed for the testatrix from April, 1890, to June 15, 1915. The claim was rejected by the majority of the executors, whereupon Hooker brought an action to enforce it. This action was dismissed on the ground that Hooker could not sue himself as representative of the estate. He thereupon assigned the claim to the appellant, Olsen, who brought this action as assignee. On a trial to the court, findings and conclusions were made in favor of respondents, and judgment rendered dismissing the action. The appellant assigns a number of errors, which are discussed under general heads, a plan which will be followed by us in the consideration here.

The first contention of appellant is that there was undisputed evidence of an express contract by the decedent to pay Hooker for his services. The evidence shows that Thomas C. Hooker, when a child of ten years of age, was taken into the home of Samuel and Marion C. Wharton and always resided with them. He was never legally adopted, but was always treated as a member of the family, and in his character of foster son proved more dutiful, considerate, and serviceable to his foster parents than many a natural child. For the years for which recovery is sought, Hooker undoubtedly rendered valuable services in the household and minor business affairs of the Whartons. That such services were appreciated and deemed worthy of remuneration appears from the fact that Samuel Wharton, on his deathbed in 1908, requested his wife Marion to provide for Hooker to the extent of $10,000. This she undertook to do in wills made by her in 1909

and 1911, in each of which she bequeathed him that sum. Both of these wills had been revoked, but in 1913, just prior to undergoing a surgical operation, she gave him her three promissory notes aggregating that sum, due in one, two, and three years. On her return home after successfully withstanding the operation, she had Hooker return these notes to her. In her last will and testament, executed in May, 1915, about a month prior to her death, she devised to Hooker a life estate in her summer resort property at Spirit Lake, Idaho, with all the personal property and effects used in conjunction with such property. There was a limitation attached, however, that, in case he married a certain woman, such bequest was to be void and he was to have in lieu thereof the sum of $5,000, but if he married any other woman and had a child or children by her, such issue was to take the fee in perpetuity. In addition to bequeathing to Hooker a quantity of personal property, he was also named as one of the residuary legatees of the estate. There is no showing as to the full value of the estate and what would be the possible value of such residuary interest, but it appears that the property directly passed to Hooker, assuming that his children took title to the Spirit Lake property, would be something in excess of $10,000 at the lowest valuation.

There is no proof of an express contract by Mrs. Wharton to pay Hooker for his services, other than her statement to him, at the time of delivering the notes for $10,000, that it was in accordance with a promise to her husband to compensate him for his past services; nor is there anything in the evidence showing an implied contract by Mrs. Wharton to remunerate Hooker upon which an action of *quantum meruit* could be based. But a promise to pay Hooker a definite sum for past services during the lifetime of Mr. Wharton was established, we think, by a clear preponder-

ance of the evidence. Not only were notes to evidence the debt executed and delivered, but there was a promise on her part to make good her husband's request. The subsequent surrender of the notes by Hooker cannot be deemed a waiver or relinquishment of that promise, since it was upon her request and explanation that it worried her to have the notes outstanding and subject to negotiation. There was no evidence of any promise by Mrs. Wharton at this time to give any equivalent for the surrendered notes, but the relations of the parties justified Hooker in assuming that Mrs. Wharton would subsequently provide for that indebtedness by will or otherwise. This she failed to do, as no mention of such liability occurs in her last will, although prior wills had expressly named a legacy in the amount represented by the promise to her husband. Her bequests to Hooker were the natural ones that a person in her situation would make to one occupying the close relation that he did to her, and were due to him rather for personal service to her than as a carrying out of Mr. Wharton's request. Whether it was an oversight that provision for $10,000 was omitted, or whether the testatrix had in mind that the bequests as made by her were to cover all obligations to Hooker for his long and faithful service as a member of the family, it is impossible to tell, but it certainly does not appear upon the face of the will that provision was therein made for carrying out her promise to her husband and to Hooker wherein a cash payment of $10,000 was agreed to be made. An earlier will in 1911 gave Hooker not only $10,000, but also the Spirit Lake property. Her promise to her dying husband in 1908 to pay the sum named to Hooker, even if one incapable of enforcement by Hooker, was a moral obligation on her part to carry out. Such obligation constituted a consideration for her promise to Hooker to give him

that sum. It was not a promise to answer for the debt of another, since, if a debt at all, it was a community debt. She took her husband's estate burdened with her promise to make provision therefrom for Hooker.

The evidence is convincing that Mrs. Wharton, as a member of the community, promised her husband, prior to his death, to give Hooker $10,000. This promise was consummated by her gift to Hooker of notes for that sum. She thereby recognized the promise as an obligation on the part of her deceased husband and herself. Her agreement to give Hooker such sum was a direct promise upon which he was entitled to rely, and constituted an existing debt on her part, notwithstanding the surrender of the evidences of the debt, since there is no evidence of the intent of either party to treat it as a waiver or cancellation of the debt. While there was no promise shown at this time to take care of Hooker to that extent in the will, he had a right to rely upon such provision, as she had often indicated, both to himself and to others, her intent to amply care for him. We think this promise of Mrs. Wharton to pay Hooker $10,000 unquestionably, under the circumstances, constituted a debt for which she was liable. While it is true the will of Mrs. Wharton is apparently liberal in its bequests to Hooker, it nowhere appears in its provisions that such bequests are designed as satisfaction for any claims he has against the estate. The will itself provides for the payment of all debts, and in such a case, if a legatee were in fact a valid creditor, no presumption necessarily arises that the bequest was given in payment of the debt, but the intent must appear that the legacy is in satisfaction. *Glover v. Patten*, 165 U. S. 394; *In re Dailey's Estate*, 43 Misc. Rep. 552, 89 N. Y. Supp. 538.

Such presumption could not be indulged where the amount of the legacy is less than the alleged indebted-

ness, nor would the presumption be aided by the fact that the creditor was named as a residuary legatee, where the residuum is uncertain in amount or time of payment. *In re Sherman,* 24 Misc. Rep. 65, 53 N. Y. Supp. 376.

The court found that the services performed by Hooker up to the year 1908, or the death of Mr. Wharton, were rendered to the community and would not constitute a personal liability on the part of Marion C. Wharton. It fails to make any finding as to her liability subsequent to that year. The evidence shows that the Whartons owned their respective properties in severalty, and that much of the services rendered by Hooker from 1892 onward were rendered in and about the separate property of Mrs. Wharton, and that his other services prior to 1908 were largely in connection with family affairs, falling within necessary family expenses. However, after the year 1908, his services were solely in the interest of Mrs. Wharton for a period of over seven years, for which period his itemized claim amounts to $7,850. But in our view of the facts, as we have indicated above, the question of whether the services rendered up to the year 1908 were for the community, and hence not a separate liability of Mrs. Wharton, becomes immaterial in so far as the liability for the sum of $10,000 is concerned. Any other contract, either express or implied, for payment to Hooker for his services was not satisfactorily established.

The respondents raised the objection that, inasmuch as Hooker had presented a claim against the estate for $1,055.06 for moneys expended by him, which had been allowed, he should have incorporated and presented at the same time the claim now in suit for $16,670 for the value of his services. The latter claim was not presented until the lapse of ten months following the

prior presentation, but was within the year succeeding the first publication of notice to creditors. The two claims were upon separate accounts for different subject-matters, and there was no necessity for their joinder in presentation against the estate. *Gedney v. Gedney,* 19 App. Div. 407, 46 N. Y. Supp. 590 (affirmed in 160 N. Y. 471, 55 N. E. 1).

The respondents also object that appellant could not maintain this action for the reason that the assignment to him was only colorable and that Hooker was the real party in interest. Our statute (Rem. Code, § 191) provides that an assignee may maintain an action "notwithstanding the assignor may have an interest in the thing assigned." As said in *State ex rel. Adjustment Co. v. Superior Court,* 67 Wash. 355, 121 Pac. 847, "this court has uniformly held that an assignee of an account or chose in action could maintain a suit in his own name, although such an assignment is made for the purpose of collection only, and the assignee had no other interest in the thing assigned."

It is our conclusion from the record that the decedent, Mrs. Wharton, obligated herself to make payment to the appellant's assignor in the sum of $10,000. This she did not do in her lifetime nor by her will. We think no other contract obligation on her part to remunerate Hooker was established.

The judgment of the trial court will be reversed, with instructions to render judgment in favor of appellant in the sum of $10,000.

ELLIS, C. J., WEBSTER, MAIN, and PARKER, JJ., concur.

[No. 14652. Department One. May 9, 1918.]

THE STATE OF WASHINGTON, *on the Relation of John W. Greb, Plaintiff*, v. DAVID W. HURN, *Judge etc., Respondent.*[1]

TIME—PER DIEM COMPENSATION—FRACTIONS OF A DAY—OFFICERS. Under Rem. Code, § 42-3, providing that an official court reporter, who is made an officer of the court, shall be paid ten dollars per diem for every day that he is actually in attendance, he is entitled to the per diem for each day regardless of the period of time that such attendance covers, inasmuch as the law does not consider fractions of a day in fixing salaries and fees for public services at so much per day.

Application filed in the supreme court February 1, 1918, for a writ of mandamus to compel the superior court for Spokane county, Hurn, J., to certify relator's statement for one day's attendance as official court reporter. Granted.

Henry L. Kennan, for relator.

Joseph B. Lindsley, for respondent.

MAIN, J. — This is an application for a writ of mandamus. The petitioner is the official reporter in the department of the superior court of Spokane county, the presiding judge of which is the Honorable David W. Hurn, the respondent.

On the 1st day of November, 1917, the petitioner was directed by the respondent to be in attendance as official court reporter. Responding to this request, the petitioner was in attendance and reported certain testimony and proceedings in the court during the morning session or forenoon of the day mentioned. He was not directed by the presiding judge to be in attendance

[1]Reported in 172 Pac. 1147.

during the afternoon session of that day. The statement subsequently prepared by the petitioner called for the payment of $10 for the 1st day of November, 1917. This statement the presiding judge declined to certify, claiming that the petitioner was only entitled to one-half of the *per diem* fixed by the statute.

This case calls for a construction of the statute authorizing official court reporters. Laws of 1913, p. 386, ch. 126 (Rem. Code, § 42-1 *et seq.*). Section 1 of this statute, among other things, provides that, when an official court reporter shall be appointed, "such stenographer shall thereupon become an officer of the court . . ." By section 2 it is made the duty of the official reporter to be in attendance upon the court "at such times as the judge presiding may direct; . . ." Id., § 42-2.

By § 3 it is provided that:

"Each official reporter so appointed shall be paid a compensation at the rate of ten dollars ($10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court, . . ." Id., § 42-3.

The question then is: If the official reporter is only in attendance a portion of the day, shall his *per diem*, fixed by the statute, be split or prorated? In this state there is no statute which fixes the length of time that the court shall be in session each day. The session of the court may consist of any number of hours, within the limit of twenty-four, between two successive midnights. In *Smith v. Board of Com'rs of Jefferson County*, 10 Colo. 17, 13 Pac. 917, the supreme court of Colorado had before it a statute which provided for the compensation of the county superintendent of schools as follows:

"For the time necessarily spent in the discharge of his duty he shall receive five dollars per day, . . ."

The question there was: Under this statute, what would constitute a day's service for the superintendent? Answering this question it was said:

"We answer, the law does not recognize fractions of days; and, when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance."

In *White v. Dallas County*, 87 Iowa 563, 54 N. W. 368, the supreme court of the state of Iowa construed a statute which fixed the compensation of commissioners of insanity "at the rate of three dollars per day, each, for all the time actually employed in the duties of their office." It was there held that the commissioners, when employed in the duties of their office on a given day, were each entitled to three dollars *per diem* fixed by the statute, regardless of the number of hours of such employment on a particular day.

See, also, *Board of Com'rs of McIntosh County v. Whitaker*, 158 Pac. (Okl.) 1136, and *Robinson v. Dunn*, 77 Cal. 473, 19 Pac. 878, 11 Am. St. 297.

Other authorities might be cited, but it is useless to multiply citations where all of the authorities, so far as we are advised, support the view that, where the statute fixes an officer's compensation at a certain sum per day, such officer performing any substantial service on a particular day has a right to the *per diem* for that day.

In the present case, we think that, under the statute, the official court reporter is entitled to the *per diem* named in the statute for every day that he is directed by the presiding judge to be in attendance upon the court, and he is, in fact, in attendance, regardless of

the period of time which such attendance for a particular day may cover. In fixing salaries and fees for the performance of public services at so much per day, the law does not consider fractions of such day.

Let the writ issue.

ELLIS, C. J., PARKER, and FULLERTON, JJ., concur.

WEBSTER, J., took no part.

[No. 14671. Department Two. May 9, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Charles E. Patterson et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PURPOSES—"DOCKS." Rem. Code, § 8740, empowering a railway company to condemn lands for "docks" and warehouses, authorizes the condemnation of sufficient ground for excavating a slip or waterway adjoining a proposed wharf; "dock" meaning an artificial basin for vessels or the space between two adjoining piers or wharves.

SAME—"NECESSITY"—EVIDENCE—SUFFICIENCY. A reasonable "necessity" within Rem. Code, § 925, is shown for the condemnation for a dock by a railroad company, where it appears that its business has grown to an extent requiring the facilities, and that still greater facilities will be required, although the company owns other property suitable, but less convenient, for the purpose which would not answer all the purposes sought.

MUNICIPAL CORPORATIONS — STREETS — VACATION — TIDE LANDS — STATUTES. Under Rem. Code, § 7842, providing that the property within the limits of a vacated street shall revert to the abutting owners, one-half to each, where a vacated street intersected the land platted diagonally, forming triangular shaped lots, the abutting owner's lines should be extended in straight lines to the center of the vacated street; and the same rule applies whether the lots be tide lands or uplands.

EMINENT DOMAIN—PETITION—DESCRIPTION OF LANDS—SUFFICIENCY. In condemnation proceedings which include portions of a vacated street that had reverted to abutting owners, a petition is insufficient

[1]Reported in 173 Pac. 186.

where it contains only a general description of all the abutter's interests in the vacated street, in view of Rem. Code, § 921, providing that the property sought to be condemned must be described with reasonable certainty.

Application filed in the supreme court February 1, 1918, for a writ of certiorari to review an order of the superior court for King county, Ronald, J., adjudging a public use and necessity in condemnation proceedings. Granted.

Hughes, McMicken, Ramsey & Rupp, for relators.

F. G. Dorety and *R. J. Hagman*, for respondents.

HOLCOMB, J.—This is a proceeding to review an order of the superior court adjudicating a public use and necessity in condemnation proceedings; and the relators also seek to review the refusal of the trial court to order the description of the lands sought to be appropriated to be made more definite and certain.

The original action was brought by the Great Northern Railway Company to condemn certain tide land property of the relators in Seattle, Washington, for the purpose of erecting a wharf and excavating a slip or dock adjoining the same for use in docking steamships and loading and unloading freight on and from freight cars of the railway company. A motion to make the description of the property to be condemned, as set forth in the condemnation petition, more definite and certain was first granted and then denied by the court below.

The proposed improvement consists of a wharf about 1,800 feet long and 150 feet wide, extending out from Railroad avenue in what is known as Smith's Cove, in Puget Sound, with a dredged dock or slip 120 feet in width along the easterly side of it where ships can berth or dock. It will run along the easterly side of and immediately adjoining the present Smith's Cove

wharf of the railway company. These wharves are used for transshipping export freight from the cars to steamers, and also import freight from steamers to freight cars. The present wharves are alleged to be inadequate for such purpose, and the company is now compelled to use outside wharves and to pile freight higher than is convenient upon the present wharf. The congestion makes it necessary at the present time to hold hundreds of cars continuously for lack of place to unload them; and, also, the company has not room to dock all the boats that wish to load there at one time. This is due to a continuous increase of business during the last few years, the increase during the last year being shown to have been about fifty per cent. The present wharf will accommodate three boats, whereas place for from four to eight boats is required, so that it is necessary to construct a wharf and dock at least as large as that which is planned. The width of the proposed wharf and also of the proposed dock is just sufficient to accommodate the necessities of the situation. It is alleged and shown that the petitioner does not own any other property equally suitable for this purpose. It owns a somewhat similar strip of property along the easterly edge of Seventeenth avenue vacated, but which is not wide enough for the improvement required, and would be more costly to operate because not adjacent to the present commercial wharf. There would be a distinct operating advantage in having the two commercial wharves adjacent to each other in order that one switching outfit could handle all cars, and dock crews could be employed in other warehouses. The proposed site is suitable for the purpose required, and petitioner already owns all the remainder of the property that is necessary. The proposed improvement is to be used exclusively in the business of the

petitioner as a public carrier and for the public benefit. The petitioner has attempted to purchase the property of relators, but has been unable to do so.

The first contention of the relators is that a portion of this property is to be used for an excavated waterway, and that there is no statutory authority for condemnation for this purpose. Section 8740, Rem. Code, empowers a railway company to condemn "a sufficient quantity of any such land . . . for yards, terminal, transfer and switching grounds, docks and warehouses required for receiving, delivering, storage and handling of freight . . ." The relators assert that the proposed waterway is not a dock, but that the word "dock" means wharf and nothing else. Dock is defined: (1) An artificial basin for vessels. (2) the space between two adjoining piers or wharves, often roofed over and used as a place of temporary storage, etc. New Standard Dictionary.

"Dock, in marine and river engineering. Vessels require to lie afloat alongside quays provided with suitable appliances in sheltered sites in order to discharge and take in cargoes conveniently and expeditiously; and a basin constructed for this purpose, surrounded by quay walls, is known as a dock." Ency. Brittanica (11th ed.).

It is defined by philologists, according to the American use of the term, as a space between wharves. *Boston v. Lecraw*, 58 U. S. 426. The proposed waterway is, therefore, assuredly a dock and an improvement for which, by the statute, railway companies are authorized to condemn land.

It is further contended that there is no necessity for its condemnation. It is urged that, the statute, Rem. Code, § 925, providing that "the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purposes of such

enterprise;" and it appearing in this case that the petitioner owns other property lying to the west of its present wharf and abutting upon the property of the port commission, with which such party petitioner has an arrangement for the construction of a joint waterway and slip between their adjoining properties, and that all of those properties are suitable for the purposes for which the property of relators is sought to be condemned, the real reason for the attempt to condemn relators' property is that it is merely more convenient for use at present time and under the present conditions; therefore it is not a necessity that exists.

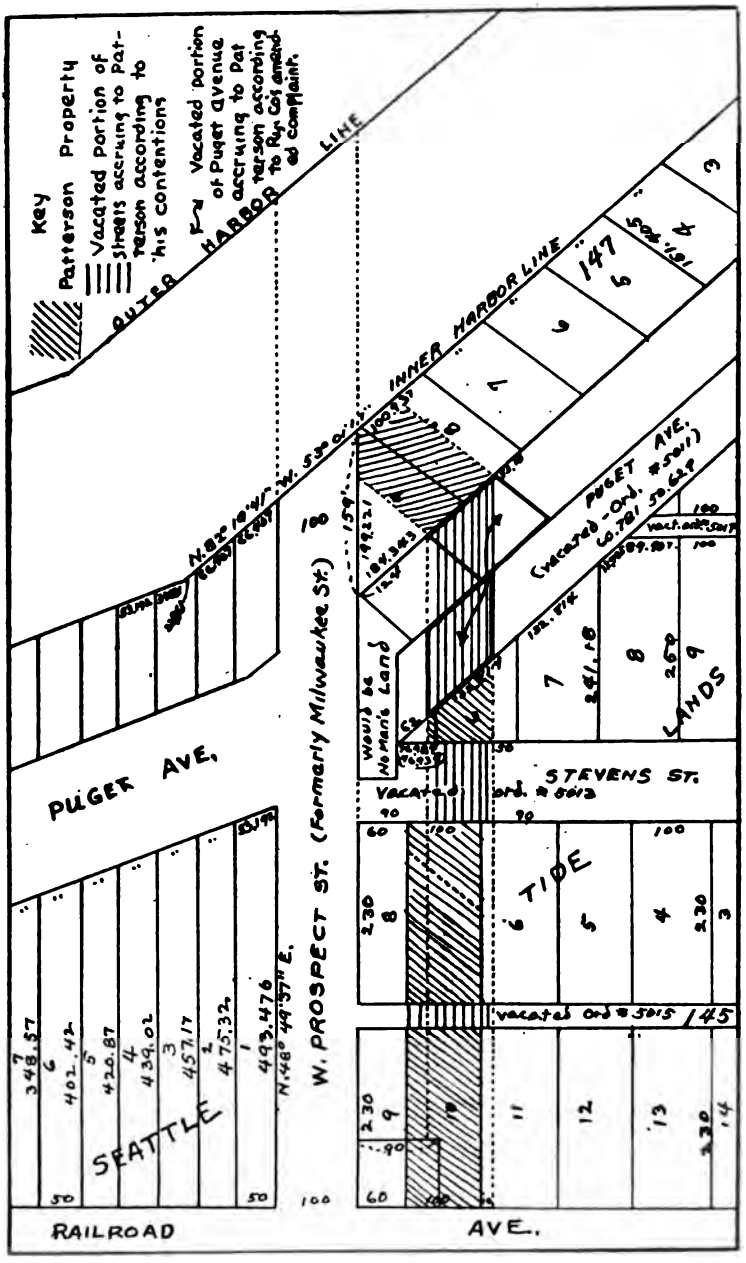
We held in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670:

"It is true that the petitioner cannot condemn this property in the absence of any necessity therefor. But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route [here another location], considered in connection with the relative cost to one, and probable injury to the other.' [Citation of cases.] Another learned court states the rule as follows: 'It may be observed generally that 'necessary' in this connection, does not mean absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case.' *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., supra* [16 Mont. 504]. 'It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work.' *Postal Tel., etc., Co. v. Oregon Short Line R. Co.*, 23 Utah, 474. . . . We think that, upon the facts and circumstances appearing in the case, the petitioner has shown a 'reasonable' necessity for the condemnation of the land it seeks to appropriate."

So, in this case, we think the petitioner has shown a reasonable necessity for the condemnation of the land it seeks to appropriate. It is shown that the commercial business arriving and departing from the port of Seattle has grown to such an enormous extent that greater facilities are required. It is reasonable to suppose that they will increase until still greater facilities will be required, and this the appropriator has the right to anticipate, the same as it had the right to anticipate the necessities of the territory through which it condemned its right of way for its railway. The right to condemn is determined by the right of the public to demand the services so as to make necessary the appropriation sought. *State ex rel. Wilson v. Superior Court,* 47 Wash. 397, 92 Pac. 269. The public has the right to demand adequate and proper facilities for the transshipment of freight from land to ocean carriers with the proper speed and economy. Such is the nature of the improvement contemplated by the petitioner in this case. The adjudication of the necessity by the trial court will not, therefore, be disturbed.

Relators further urge that the petition is insufficient to sustain any condemnation for the reason that there is no precise description of a portion of the property sought to be condemned. There is a controversy between the parties as to what property is really owned by the relators. The statute, Rem. Code, § 921, provides that the petition shall describe the lands, real estate, premises or other property sought to be appropriated, with reasonable certainty. The lots owned by relators are tide land lots. They were purchased by relators as preference rights of upland owners for the purpose, as they assert, of obtaining a continuous strip of land from their upland to the harbor area as defined by the state. The tide lands were platted into lots and blocks, streets and alleys, prior to the time that the

conveyance was made by the state to the relators. And not all the lots are rectangular or even quadrangular. Streets were platted and dedicated, crossing the lots diagonally. Afterwards, by ordinance, the city of Seattle vacated some of these streets, including one diagonal street known as Puget avenue, and another street known as Stevens street, across which relators' lots would extend. Two of relators' lots, fractional lot 8 and fractional lot 9, in block 147, which extended to the inner harbor line and abutted upon Puget avenue, are at an angle with the remainder of relators' lots and do not extend by continuous straight lines to the inner harbor line. Presumably this was thought necessary in platting the lots, in order that the ends of the lots might be perpendicular to the inner harbor line as established. A plat of the lots and streets involved herein is attached hereto, showing the lots owned by Patterson and the vacated portion of streets accruing to the abutting property owners, the vacated portion of streets accruing to Patterson, according to his contention, being marked in stripes, and the vacated portion of Puget avenue accruing to the Pattersons, according to the railway company's amended complaint, being indicated by a double arrow.


Key
Patterson Property
Vacated portion of streets accruing to Patterson according to his contentions
Vacated portion of Puget Avenue accruing to Patterson according to Pltf's Cos amended complaint.
OUTER HARBOR LINE
INNER HARBOR LINE
PUGET AVE.
(Vacated - Ord. #5011)
Would be No Man's Land
STEVENS ST.
Vacated Ord. # 5013
W. PROSPECT ST. (Formerly Milwaukee St.)
TIDE LANDS
Vacated Ord # 5015
SEATTLE
RAILROAD AVE.

The record shows that, upon objections to the petition as originally drawn, which failed to give the particular description of these tracts within the limits of the vacated streets, the court ordered petitioner to amend its petition in this respect. Petitioner made such an amendment and set out by metes and bounds that portion of vacated Puget avenue which it claimed belonged to relators. The portion so described extended across Puget avenue in such a manner as not to connect continuously with the property with which it should join, but was described in such a manner as to leave a jog in the two properties instead of forming a continuous strip for the whole width, leaving the connection across Puget avenue at one point only about twenty feet in width. The relators objected to this description as the part of Puget avenue accruing to them, and sought to have the court declare that the strip was continuous for its full width across Puget avenue. The court, upon hearing the objection, held that the strip as designated by petitioner was correct, but reserved the right to change this ruling upon the trial if the court should conclude that its decision upon this point was erroneous. Thereafter petitioner asked leave, and was granted permission, to withdraw the amended petition and reinstate the petition as originally drawn, which did not attempt to describe in any manner the portion of Puget avenue belonging to relators, except to designate in a general way that it sought to condemn all interests of the relators in the street. As the petition now stands, there is no description of the property owned by relators as a part of vacated Puget avenue, except a general description of all their interests in the vacated portion of that street.

Section 7842, Rem. Code, provides that:

"When any street, alley or public way in any incorporated city or town . . . has heretofore been or

may hereafter be vacated . . . the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, one-half to each, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated."

This was enacted by the legislature in 1901. Relators contend that, since they were entitled to a continuous strip from their upland to the inner harbor line, and that, since the tide lands were platted in such a way as to make their end lots abutting on the inner harbor line extend at an angle from their lots in the remainder of the tide land plat, they are entitled to have the side lines of the lots extending from the upland extended across the vacated street to meet the side lines of the lots which extend at an angle therefrom to the inner harbor line, and that, in apportioning the land within the vacated street, the court should take this into consideration and apportion the vacated land in accordance with the original intention of the tide land purchasers.

We are of the opinion, however, that we must take the statute providing for the reversion of property in vacated streets as solely controlling in the matter. It provides that the vacated portion shall belong to the abutting property owners, one-half to each. Relators obtained their tide land lots with the streets dedicated between them and subject to the vacation statute. The question to be determined then is, Where streets intersect the land platted diagonally and form triangular shaped lots, how is the vacated portion to be apportioned one-half to each? Undoubtedly somewhere there will be some land lost which will become "no man's land." Even if the lines of the lots abutting on the

inner harbor line are diverted at an angle so as to meet, in the center of the street vacated, the extended lines of the other lots in the other blocks, there will be some small tracts of land at the margin of the blocks which it will be impossible to apportion to any one. Moreover, it is to be assumed that, since these lots were platted, they are subject to diverse ownership, and the lots abutting on the inner harbor line and on Puget avenue may all belong to different owners from the lots extending back toward the upland. While the owners of the upland abutting on the tide lands had the preference right to purchase before any one else purchased the tide lands up to the harbor line, nevertheless, if they did not purchase, any one had a right to purchase tide lands from the state, and did so. While these particular tide land owners exercised their preference right and attempted to procure continuous strips of land from their upland to the harbor line, all others may not have done so. All the lots in block 147, except those owned by relators, may be owned by entirely different owners from the tide land lots in blocks 145 and 146. If these were not tide lands, there would be little doubt that we would adopt the rule that the lateral lines of all lots should be extended in straight lines to the center of the street, and that the portion of the vacated street lying between the center line and the ends of their lines should revert to and become their property. Because these are tide lands, we are asked to adopt a different rule and attempt to make a rule which will provide for continuous strips of land from the upland to the harbor line. This we do not feel able to do. We think these lands must be allotted the same portion of the vacated streets that they would be in other platted lands, the lateral lot lines to be extended straight from their former property line to the center line of the vacated street.

This determination will sustain the description as contained in petitioner's amended petition. We are of the opinion that petitioner should be required to describe the lands sought to be appropriated with all the certainty that is possible, in order to determine the land appropriated and condemned by actual survey. It is necessary, also, in order that a jury of condemnation may know how much land is appropriated and to be paid for.

The writ will be granted to the extent of directing the court below to require petitioner to file or refile its amended petition describing the property of relators to be condemned as indicated herein. Relators will recover their costs herein.

ELLIS, C. J., and MOUNT, J., concur.

FULLERTON, J., concurs in the result.

[No. 13453. *En Banc.* May 10, 1918.]

LAURETTA B. KELLEY, *Respondent* v. SCHOOL DISTRICT No. 71, OF KING COUNTY, *Appellant.*[1]

SCHOOLS AND SCHOOL DISTRICTS—LIABILITY FOR TORTS—STATUTES—REPEAL. The school code (Rem. Code, § 4302 *et seq.*) providing for a general and uniform public school system, does not impliedly repeal Id., § 951, rendering a school district liable for torts; in view of the fact that repeals by implication are not favored and that the act makes no reference to liabilities for torts.

STATUTES—CONSTRUCTION—RETROACTIVE EFFECT. Laws 1917, p. 332, § 1, providing that no action shall be "brought or maintained" against a school district for non-contractual acts or omissions of officers or employees relating to playgrounds owned or operated by the district does not apply to an action which had gone to judgment against the school district prior to the taking effect of the law in June 1917, notwithstanding the pendency of an appeal by the defendant at that time; since the prevailing party is not "maintaining" an action by appearing and resisting the appeal.

SCHOOLS AND SCHOOL DISTRICTS—INJURY TO PUPIL—NEGLIGENCE. The negligence of a school district in maintaining a swing is sufficiently shown by the breaking of an iron ring of considerable thickness, which was used in one position until it was worn down at the point of contact to a thin edge, which finally gave way.

APPEAL—REVIEW—INSTRUCTIONS. Error cannot be predicated upon a paragraph of the instructions standing alone, where the instructions, considered as a whole, could not have prejudiced the appellant.

SCHOOLS AND SCHOOL DISTRICTS—INJURY TO PUPIL—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries to a child sustained through a defective playground swing, requested instructions on the subject of contributory negligence and assumption of risks are properly refused where they assumed that the child owed the duty of inspecting the swing.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 6, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor through the breaking of a swing. Affirmed.

[1]Reported in 173 Pac. 333.

Alfred H. Lundin, Robert H. Evans, and *S. M. Brackett,* for appellant.

Brightman & Tennant, for respondent.

FULLERTON, J.—The respondent, a child nine years of age, while attending a public school at Kirkland conducted by the appellant district, was injured by the breaking of a swing maintained by the district as part of the playground equipment on the school grounds. On a trial to a jury, she recovered a verdict of $750. From the judgment entered thereon, the school district prosecutes this appeal.

The first contention of the appellant is that a school district is not liable for an injury to a pupil of the school caused by the negligent maintenance of apparatus on the school grounds, although used, and installed to be used, by the pupils of the school for exercise and play. It is conceded that this court has held to the contrary in the cases of *Redfield v. School District No. 3,* 48 Wash. 85, 92 Pac. 770, and *Howard v. Tacoma School District No. 10,* 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792, but it is said that these cases have for their foundation a section of the code creating a liability (Rem. Code, § 951), and that the particular section was repealed, in so far as the liability of school districts is concerned, by a later enactment of the legislature. The act thought to work the repeal is ch. 97 of the Laws of 1909, p. 230 (Rem. Code, § 4302), the act, as its title recites, "establishing, providing for the maintenance of, and relating to, a general and uniform public school system for the state of Washington." But a perusal of the act shows that there was no direct repeal of the section cited, and, if there is a repeal at all, it is a repeal by implication. The act is long and it would be unprofitable to attempt to epitomize its provisions here. Its examination will show that it makes refer-

ence in a certain section to the school district's contractual obligations, and provides for the payment of judgments against it entered upon such obligations. But it nowhere makes reference to liabilities for torts, much less does it say that no liability shall attach for the commission of a tort. When it is remembered that repeals by implication are not favored, we cannot think there is here room for holding an implied repeal merely because in this particular section no mention is made of torts.

Since the happening of this accident and the recovery thereon in the court below, the legislature has provided that no recovery shall be had against a school district for accidents such as the one now before us, the act taking effect while the appeal was pending in this court. Laws of 1917, p. 332. By a supplemental brief it is urged that this act is a bar to any recovery and requires a reversal and dismissal. But the case is, in its situation, parallel to that of *Bruenn v. North Yakima School District No. 7*, 101 Wash. 374, 172 Pac. 569, and, on the authority of that case, is still a liability against the district.

On the merits of the controversy, the appellant contends there was no proof of negligence on its part in the maintenance of the swing which broke and caused the injury, but we think the evidence ample in this respect for the jury. In fastening the swing to its supports, an iron ring was used which passed through the eye of a staple. The use of the swing caused the ring to move in the staple eye, creating a friction which gradually wore it down at the point of contact. It was the giving way of this ring at the point of contact that caused the accident. The objection to the proof is that there was no evidence of want of inspection, no evidence that it had been in a worn and defective condition for any considerable period of time, or that inspection

would have disclosed its dangerous condition. But the broken ring was before the jury, and its examination, when considered with the surrounding conditions, furnished proof of all of these things. It was, when installed, of considerable thickness, sufficient in strength to sustain any weight that common prudence could reasonably expect to be placed on the swing. But the ring was suffered to be used in one position, the result being that it wore down at the point of contact with its fastening to a thin edge, having but a fraction of its original strength when it finally gave way. In the light of these facts, it is too much to suppose that the ring became dangerous suddenly, or that ordinary careful inspection would not have discovered its dangerous condition in time to have averted the accident. Since the school district installed the swing, they were charged with the duty of keeping it reasonably safe for the uses for which it was intended. This involved the duty of inspection, and a failure to perform the duty in an ordinarily prudent manner was negligence.

Complaint is made of certain instructions given and of the refusal to give certain requested instructions. Of the instructions given, it is said that they ignore the element of time with reference to the duty of inspection, thus fixing liability upon the defendant even though the defect causing the swing to give way occurred suddenly and immediately prior to its giving way; that they invoked the doctrine of *res ipsa loquitur*, a doctrine not applicable to the facts of the case; and that no rule was given the jury by which they could determine whether the duty of inspection had been prudently exercised. But we cannot think the language of the particular paragraph pointed out as containing these inferences will bear the interpretation put upon it, even though it stood alone. The paragraph, however, did not stand alone. Elsewhere the

court defined the issues, instructed that no presumption of negligence arose from the mere happening of the accident, and clearly pointed out what the jury must find from a preponderance of the evidence before they could find liability on the part of the defendant. As a whole, the instructions were clear and unbiased and could by no reasonable interpretation have prejudiced the defendant. It is not necessary that a trial court in instructing a jury follow the statement of each general rule with its modifications and exceptions. Such a practice tends rather to confusion than enlightenment. It is the better practice to do as was done in this instance; first state the general applicable rules, and follow them with the modifications and exceptions.

The requested instructions related to contributory negligence on the part of the minor plaintiff. The court was asked to instruct the jury that, if the plaintiff could, by the exercise of ordinary care and caution, have foreseen that the material of the swing was defective or worn and that, by using it or swinging therein, an accident would happen to her through the breaking of the swing, she assumed the risk of swinging therein, and could not, for that reason, recover for her injuries. But this assumes that the plaintiff owed a duty of inspecting the swing. Such is not the rule. She had a right to assume that the defendant had performed its duty and that the swing was reasonably safe for the uses for which it was constructed. Not having this duty imposed upon her, she cannot be charged with the risk of its breaking because she failed to examine it before using it. The plaintiff was nine years of age. It may be doubtful, we think, whether a child of her tender years could, in any event, be held to the doctrine of assumption of risk or contributory negligence. *Gregg v. King County,* 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C 135. But there was here evidence that she

was using the swing in the manner it was intended to be used, and hence nothing upon which to base an instruction of contributory negligence or assumption of risk.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, CHADWICK, WEBSTER, and HOLCOMB, JJ., concur.

[No. 14370. *En Banc.* May 10, 1918.]

GREAT NORTHERN RAILWAY COMPANY, *Plaintiff*, v. THE STATE OF WASHINGTON, *Defendant*.[1]

EMINENT DOMAIN—DAMAGING PROPERTY—LIABILITY OF STATE. Under Const., art. 1, § 16, forbidding the taking of private property without just compensation, the state is liable if, in building a state highway without negligence without having condemned the right, it was necessary to blast out and dump rock and material upon a railroad track to its damage.

SAME—LIABILITY OF STATE—NATURE. In the taking or damaging of private property for public use without negligence, the state acts in its sovereign capacity, and failure to condemn the right is no excuse for denying the state's liability for the damage done, as it is not a trespasser or tort feasor.

SAME—LIABILITY OF STATE—ACTS OF CONTRACTORS OR OFFICERS. Where such damage was done by direction of the state, it is liable as the superior, although it does the work by contract or by direction of its duly authorized officers.

SAME—LIABILITY OF STATE—INJURIES NOT ANTICIPATED. The state would be liable for such damages necessarily resulting from the construction of a highway, although they were not anticipated or contemplated in the plan of construction.

SAME—LIABILITY OF STATE—INSTRUCTIONS. In such case, where it is admitted that all the work was carefully done, it is error to give an instruction leaving to the jury whether any damage resulted from negligent acts.

SAME—LIABILITY OF STATE—BLASTING. If blasting is necessary in the construction of a highway by the state, in its sovereign capacity,

[1]Reported in 173 Pac. 40.

the act is not tortious and the state is liable for the injuries inflicted.

SAME—LIABILITY OF STATE—DAMAGES. Where the state in building a highway injures a railroad by blasting and dumping rock upon the track, it is liable for the increased expense incurred in operating trains and time consumed in making repairs and labor and supplies on account of delays, as a deprivation of the use of its property, as though it had been physically taken.

SAME—LIABILITY OF STATE—DAMAGES—OFFSET OF BENEFITS. If a railroad company, damaged by the building of a state highway, was benefited in a special degree, the state may offset any benefits that may be ascertained with reasonable definiteness, under Const., art. 1, § 16, providing that no right of way shall be appropriated to the use of any corporation "other than municipal" until full compensation is paid, irrespective of any benefit from the improvement.

SAME—LIABILITY OF STATE—DAMAGES—EVIDENCE. In an action for damages to a railroad track through the blasting for a state highway, it is error to allow the contractor to testify that the company refused to allow him to take up the rails before setting off blasts, and that the same would have avoided the damage, there having been no condemnation, as temporary removal interfered with the owner's use.

Cross-appeals from a judgment of the superior court for Thurston county, D. F. Wright, J., entered December 16, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property through the construction of a state highway. Reversed on plaintiff's appeal.

F. V. Brown and *F. G. Dorety*, for plaintiff.

The Attorney General and *Glenn J. Fairbrook, Assistant*, for defendant.

HOLCOMB, J.—Plaintiff brought this action under the constitutional provision to recover compensation for damage done by the state to plaintiff's track, which resulted from the construction of a state highway. The damage complained of occurred along a stretch of two miles at the base of Chuckanut mountain, a few miles south of Bellingham. The railroad track is located

along the shore at the base of the mountain, and the waterfront road of the Pacific highway, which was constructed by the state in 1914, 1915 and 1916, was built upon the hillside approximately parallel with and from 125 to 175 feet above the railroad track. The hillside consists of a thin layer of top soil over a foundation of solid rock. On account of the steepness of the bluff it was necessary to blast out a shelf for the highway and to dump material on the hillside and railroad track below. This caused slides, obstructed the track, bent rails, damaged ties, poles and wires, and delayed trains, for which plaintiff claims an expenditure of $16,715.53, and an estimated sum of $25,000 to protect against imminent danger of further damage from slides caused by deposits and impaired drainage. Every effort was made to avoid unnecessary damage. Extra rails and ties were provided in advance, flagmen were stationed at the danger zones, a special telephone was installed, and the contractor's men employed upon the state highway always helped to clear the track, working in company with the railway section crew. Notwithstanding these precautions, the plaintiff, in two years during the construction of the highway, was forced to expend $15,576.80 in replacing the rails and equipment, removing slides and debris, paying train crews during periods of delay, providing flagmen, etc. Of this sum, bills amounting to $1,139.22 were paid by the state. A written stipulation was filed covering the amount of expenditures, to which was attached itemized bills showing the amounts claimed for train delays, labor, rental of equipment, and other items. It was stipulated that these items were actually expended in connection with material which fell upon the railroad track, but it was denied that the falling of the material upon the track was caused by the highway construction or that the state was responsible therefor.

The state's demurrer to the complaint and motion for judgment *non obstante veredicto* were overruled, and the state has cross-appealed from the orders overruling the demurrer and denying its motion for judgment *non obstante veredicto*. A verdict was returned in favor of the plaintiff in the sum of $7,391.34. The plaintiff moved for new trial on the ground of errors in instructions and in admission of evidence, which motion was denied and judgment entered on the verdict. Plaintiff appeals from the judgment and order denying a new trial.

The plaintiff's theory is that, in inflicting the damage, the state acted in its sovereign capacity, that it was necessary for the accomplishment of a public object, and that plaintiff is entitled to just compensation under Const., art. 1, § 16. The fact that the state did not condemn plaintiff's property in advance does not absolve it from liability where no negligence is charged in the performance of a governmental duty. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

The constitutional provisions must have been intended to protect all the essential elements of ownership which make property valuable. Among these elements is fundamentally the right of user, including, of course, the corresponding right of excluding others from the use. A physical interference with the land which substantially obstructs this right takes the plaintiff's property to just so great an extent as it is thereby deprived of its right. To deprive one of the use of his property is depriving him of his property, and the private injury is thereby as completely effected as if the property itself were physically taken. Accordingly it has been held that any use of land for a public purpose which inflicts an injury upon adjacent land such as would have been actionable if caused by a private owner is a taking and damaging within the meaning of

the constitution. *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392, lays down the principle with which we are in accord:

"Neither state nor municipal government can take private property for public use without due compensation, and this benign provision of our constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree. The same law that protects my right of property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper; but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted, that the city should be excused from paying for the injuries it has directly wrought? It is said that the city must grade streets and direct the flow of waters as best it can for the interest of the public. Undoubtedly, but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading, or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street as when wholly taken and converted into a street? Surely the question of the degree to which property is taken can make no difference in the application of the principle. To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid."

It is contended by the state that a suit against it to recover for damages will not lie, and that the damage herein involved is not for a public use within the meaning of the constitutional provision requiring compensation. We cannot accede to this contention; for if the state could have condemned the right to inflict the

necessary damage or invade plaintiff's property, its failure to so condemn is not an excuse to deny plaintiff's recovery. *Kincaid v. Seattle, supra; Provident Trust Co. v. Spokane,* 75 Wash. 217, 134 Pac. 927, Ann. Cas. 1915C 63.

When taking private property for a public use, the state acts in its sovereign capacity. *Gasaway v. Seattle,* 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68. It goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking without malice or intent to do wrong, and presumptively for the public good. Under the statute, it cannot put on the cloak of a tort feasor if it would. It cannot plead a wilful wrong to defeat a just claim. The action for damages for land taken without compensation is usually spoken of and is in its nature one of trespass, but it is not strictly so. If the state or its agent, in the prosecution of a public work, takes no more than is necessary and prosecutes its work without negligence it is neither a trespasser nor a tort feasor. *Kincaid v. Seattle, supra.* If we should hold that the state cannot condemn the right to inflict the necessary damage in the prosecution of a public work it, in effect, would hold that the officers and contractors of the state could be enjoined from committing the damage.

While the work was in progress, the plaintiff attempted to enjoin the contractor from inflicting the damage. The court said:

"To hold to the contention of complainant [*i. e.,* to grant the injunction] would render the state impotent in this enterprise and destroy a large public work of public necessity." *Great Northern R. Co. v. Quigg,* 213 Fed. 873, 879.

In our opinion, the theory that property rights are ever to be sacrificed to public convenience or neces-

sity without just compensation is fraught with danger, and should find no lodgment in American jurisprudence. If the acts which caused the injury were done under, and in consequence of, the direction of the state, then the state is to be regarded as the superior and responsible as such, although it does the work by contract and by the direction of its duly authorized officers. The plaintiff's complaint states a cause of action under art. 1, § 16, of our constitution, and the state's demurrer was properly overruled. There is no merit in the state's assignment of error in denying its motion *non obstante veredicto*. This brings us to plaintiff's assignment of errors.

I. Plaintiff assigns error in the court's instruction No. 12. It, being contrary to the view we have above expressed, is clearly erroneous.

II and III. It is contended by plaintiff that all of the last paragraph of instruction No. 9 is erroneous, but we think the same is correct, excepting that portion which reads:

"But the state is not liable for any damage to the plaintiff, if you find that any damages were so sustained, which were not anticipated in or contemplated in the plan of the construction of the highway referred to in the complaint, and if you find that any damage has resulted to the plaintiff which was not contemplated by the plan of the construction of the highway such damage may not be considered by you in arriving at your verdict."

That portion of the instruction is contrary to the view we have expressed herein and if the same is supplanted by that portion of plaintiff's third requested instruction, or an instruction of similar import, it would express the law as we have determined. That portion of plaintiff's third requested instruction to which we refer reads as follows:

"If, in addition to the foregoing facts which are admitted, you should find that the plaintiff's railway has been or will be physically damaged by the casting or sliding of earth or rock upon it as a necessary result of such construction of the state highway, or as a necessary result of any work of highway construction performed in a manner directed by the state officials in charge, or in a manner necessary to, and reasonably to be expected in, every practicable, known and practiced engineering method of constructing such highway, your verdict should then be for the plaintiff, and for all of such damage you should award compensation for the plaintiff."

IV. That portion of instruction No. 13 reading as follows:

"And if you find that, in constructing said highway, any contractor or employee of the state left loose rocks or material upon said hillside which could have been removed, but which, having been left on said hillside, caused damage to the plaintiff, and if you find that such material was negligently left on said hillside, then the state is not liable for any damage which may have resulted from such negligent acts,"

is erroneous, for it leaves the jury to determine whether or not the material was negligently placed, when there is no evidence of negligence, it having been admitted that every portion of the work was done in a prudent and cautious manner.

V. Instruction No. 11 is erroneous under the rule announced in *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086, and *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740. In the latter case, the court said:

"The authorities are agreed upon the question that one who, in blasting upon his premises, casts debris upon the land of another is liable in damages, regardless of the degree of care or skill used in doing the work. 19 Cyc. 7."

If blasting is necessary in the construction of a highway, and damages cannot be avoided, the state may inflict it by virtue of its sovereign right, but it must respond in damages, as it cannot be considered as tortious.

VI and VII. The court erred in failing and refusing to give that portion of plaintiff's sixth requested instruction, or an instruction of similar import, which is:

"You should also include in such verdict any increased expense which has been or will be incurred by the plaintiff in operating said railway during the time necessarily consumed in making such repairs, such as additional labor and supplies used on account of trains delayed or annulled as a result of any damage to the said railway, for which the state is liable under said instructions."

Our views as heretofore expressed, explicitly point to the theory that plaintiff may recover for deprivation of the use of his property as though it was physically taken. Therefore instruction No. 10 is clearly erroneous.

VIII. Plaintiff contends that the court erred in giving its instruction No. 14 relating to the setting off of benefits. The constitution, art. 1, § 16, provides:

"And no right of way shall be appropriated to the use of any corporation *other than municipal* until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation."

We find no constitutional provision similar to ours. Municipal corporations are permitted to offset benefits from condemnation damages when taking and damaging land for public uses. *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47. The word "municipal" cannot be construed strictly, but was intended to distinguish public political bodies from corporations of a quasi

public nature. If the building of the state highway benefited the railroad property in a special degree, and such benefit could be ascertained with reasonable definiteness and not merely speculatively, we think that that benefit should be set off against the damages, injury and inconvenience caused by the building of the highway in a proper and careful manner. The instruction was properly given.

IX. Plaintiff contends that the court erred in admitting testimony that the Great Northern had refused to allow the contractor to take up its rails from time to time before setting off blasts, and in denying plaintiff's motion to strike all of that testimony. It cannot be said that the testimony of the contractor that he requested plaintiff to take up and replace the rails of its track each time a blast was to be exploded, and that he could have avoided practically all of the damage if his request had been granted, is proper. The state had made no arrangements in advance, nor had it condemned the property. The rails were a part of a continuously operated property, fixed in place for use, and a part of as necessary a public use as the state's highway itself, and were there first. Surely the railway company could not be made to take up its track without condemnation. The contractor could not remove them temporarily without interfering with the use of the railway by its owner. This evidence should not have been admitted, and the denial of plaintiff's motion to strike it was erroneous.

For the errors herein indicated, the cause is reversed on plaintiff's appeal and remanded for new trial.

Ellis, C. J., Mount, Main, Parker, Webster, Fullerton, and Chadwick, JJ., concur.

[No. 14410. Department Two. May 10, 1918.]

SHIRLEY HOUGHTON, *Plaintiff and Appellant*, v. WILLIAM J. HOY, *Respondent*, GUARDIAN CASUALTY & GUARANTY COMPANY, *Defendant and Appellant*.[1]

CONTRACTS—CONSTRUCTION—RAILROAD CONSTRUCTION—DELIVERY OF MATERIALS. A contractor's agreement to deliver to the subcontractor sand and gravel "as near as available railway trackage shall permit, to bunker, hopper or working sites" does not require delivery to the subcontractors to bunkers and working sites, where the principal contract, which was made part of the agreement, plainly indicated that the traffic should not be interfered with, and placed the entire contract of tracks and traffic in the hands of the railway superintendent, who refused permission to make deliveries west of a certain street; since the tracks were not then "available" for such deliveries.

PRINCIPAL AND SURETY — CONTRACT — SUBCONTRACTOR'S BOND—NOTICE OF BREACH—SUFFICIENCY. A surety company is given sufficient notice of the principal's breach of the contract, where, having no agent in the city, a registered letter and telegram were sent to its home office giving notice of the breach, and that it would be necessary to take over the work and requesting what it proposed to do about it.

SAME—RELEASE—EXTRAS. A compensated surety on construction work is not released because the work included extras, where the extras were provided for in the contract.

Appeal from a judgment of the superior court for Spokane county, Henry L. Kennan, judge *pro tempore*, entered April 5, 1917, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Nuzum, Clark & Nuzum, and *John Hubert Mee*, for appellants.

Cannon & Ferris, for respondent.

[1]Reported in 172 Pac. 1148.

MOUNT, J.—This action was brought to recover the sum of $50,856.30, alleged to be due from the defendant on account of work done for the defendant under certain contracts. The defendant, after denying certain material allegations of the complaint, alleged a counterclaim and set-off, and demanded judgment against the plaintiff and the Guardian Casualty & Guaranty Company in the sum of $33,485.57. After issues were joined, the case was tried to the court without a jury, and findings were made and judgment entered in favor of the defendant for $22,736. The plaintiff and the Guardian Casualty & Guaranty Company have appealed from that judgment.

The facts may be briefly stated as follows: On October 8, 1914, the Northern Pacific Railway Company let a contract to W. J. Hoy Company for the construction of an elevated roadway through the city of Spokane. This elevated roadway was about three miles in length. It consisted of concrete retaining walls on each side of the right of way and overhead bridges across the public streets of the city over which the railway line extended. On November 14, 1914, the W. J. Hoy Company, original contractor for the Northern Pacific Railway Company, entered into a subcontract with R. H. Van Sant, Jr., Shirley Houghton, Raymond Ashton, and G. T. Bridgman, copartners doing business under the name of the Pacific Concrete Placing Company (which shall hereafter be referred to as the Placing company), by which contract the Placing company undertook to mix and place so much of the concrete as would be required for the retaining walls, cross-walls and bridges, at an agreed price of ninety cents per cubic yard. Thereafter, on February 11, 1915, the W. J. Hoy Company entered into another subcontract with the Placing company by which the latter company agreed to construct and maintain, with materials furnished by the Hoy

company, the wooden forms for retaining walls, cross-walls and abutments. These two contracts provided that the Placing company should furnish surety bonds for the faithful performance of these contracts, and bonds were furnished by the Guardian Casualty & Guaranty Company in the sum of $40,000 for the faithful performance of the concrete contract, and $7,000 for the faithful performance of the other contract. These bonds were both under date of April 9, 1915. Work was commenced on these contracts by the Placing company in March, 1915, and continued until in December of that year, when the work was stopped on account of the winter months. During the time the work was in progress, payments were made by the Hoy company to the Placing company in accordance with the terms of the contracts to the amount of ninety per cent of the estimates made by the supervising engineers.

After the work was closed down in December of 1915, the superintendent of the railway company notified the Hoy company, and in turn the Hoy company notified the Placing company, that no more deliveries of sand and gravel or concrete would be permitted upon railway tracks west of Division street. The Placing company insisted that it was entitled to deliveries of sand and gravel and cement at the work sites where work was being done, and for failure of the Hoy company to make such deliveries, declined to proceed with the contract for concrete work when the work was required to be started in March of 1916. The Hoy company thereupon notified the Guardian Casualty & Guaranty Company of this fact and that work would be started on the 28th day of March, 1916, and that, unless the Placing company or the Guardian Casualty & Guaranty Company proceeded with the contract for concrete work, the Hoy company would take charge of the work

and finish it at the cost of the Guardian Casualty & Guaranty Company and of the Placing company, which it did. The Placing company continued with the contract for retaining wall, cross-wall and abutment forms under the retaining wall contract, until the month of August, 1916. At that time the Hoy company refused to pay the monthly estimate of work done by the Placing company upon this contract, because the Placing company was then indebted to the Hoy company in excess of the amount of the monthly estimate. The Placing company thereupon refused to comply with that contract, and shortly afterwards the partners of the Placing company dissolved the copartnership and assigned to Shirley Houghton all their interest in the assets of the partnership and he assumed all the liabilities thereof. He thereafter brought this action, alleging the amounts due from the Hoy company to the Placing company to be $50,856.30. The Hoy company thereafter filed its answer, brought in the Guardian Casualty & Guaranty Company as defendant, and alleged that it had expended in excess of the amount due the Placing company the sum of $33,485.57, for which the Hoy company prayed judgment against the Placing company and the Guardian Casualty & Guaranty Company.

The trial of the case involved a multitude of accounts on the part of both the appellants and the respondent. The record is voluminous; but the primary question, and the one which controls the disposition of the case, depends upon a construction of the different contracts.

The contract between the Northern Pacific Railway Company and the Hoy company provided, among other things, as follows:

"The contractor agrees to furnish all labor, services and material for, and construct, complete and finish in the most thorough, workmanlike and substantial man-

ner in every respect to the satisfaction of the chief engineer of the company, within the time hereinafter specified, and according to the specifications hereto annexed and made part of this contract, all concrete construction, waterproofing, foundations, . . .

"Date of completion

"The work is to be commenced immediately and completed on or before the first day of June, A. D. 1916.

"The company will furnish free transportation over its own line subject to the review and instructions of the chief engineer as to the necessity for and proper use of same, for contractor's outfit to the work and return to point of origin or to a point having an equivalent tariff rate.

"Free transportation will be furnished for cement west of Logan, Montana.

"The contractor to pay full tariff rate on all other material and supplies entering into or used on the work, and contractor shall buy all such material if possible at points which will permit the company to receive the haul on such materials, routing same via the lines of the company and its connecting lines.

"Nothing herein contained shall be construed to relieve the contractor of payment of demurrage charges under car service association rules, for shipments of equipment and material by either the railway company or the contractor to be used on this contract."

In the specifications above referred to, it was provided as follows:

"Plans and Ordinance:

"All work must conform in every respect to the general and detail plans and specifications of the railway company, . . .

"Excavation:

"The price paid for excavation shall include backfilling and the actual haul of materials for any distance not exceeding 600 feet. The limit to which any materials may be required to be hauled shall be 3,500 feet.

"Engine, Work Train Service and Equipment:

"Necessary engine, work train service and equipment will be furnished the contractor at the railway company's regular rates for company work.

"Maintaining Traffic:

"The engineer will not permit the contractor to disturb or obstruct the track except as directed by the division superintendent of the railway company.

"The railway company will furnish such number of flagmen as the division superintendent may direct for the protection of traffic. The expense of flagmen services will be borne by the railway company.

"Rearrangement of Existing Tracks:

"The necessary rearrangement of the existing tracks of the railway company in order to give the contractor access to the site of the work will be done by the railway company's forces under the direction of the engineer.

"The general plan of track rearrangement as now proposed by the railway company may be seen at the office of the engineer, and the railway company will carry out this plan or a modification of same as rapidly as the business of the railway company will permit and the progress of the work requires, but it shall be distinctly understood that the railway company assumes no responsibilities for delays to the contractor account of track changes, the transferring of traffic from surface to elevated grades, obstruction of the work by the traffic of the railway company, etc.

"No changes whatever will be made in the existing tracks of the railway company except in cases where it is practically impossible to construct the work otherwise.

"Delivery of Material:

"Material received at the work in car load lots will be set out on the most convenient spur track available east of Division street.

"If the railway company furnishes cement, storage room will be provided at some point east of Division street.

"The contractor shall unload all cars within 48 hours of receipt of same, or pay regular car demurrage. . . ."

The contract between the Hoy company and the Placing company contained the following provisions:

"The Hoy company shall furnish all sand, gravel or crushed rock and cement required for all concrete work done in connection with said separation work delivered as follows: Sand and gravel or crushed rock f. o. b. cars in said city of Spokane as near as available railway trackage shall permit, to bunker, hopper or working sites of said Placing company, and furnish cement in cars at points where railway trackage is available and most suitable to the Placing company.

"Said Hoy company agrees to furnish not less than 500 cubic yards of gravel or rock, 250 cubic yards of sand and 500 barrels of cement per working day of twenty-four hours and shall, if larger quantities are desired by the Placing company, endeavor to furnish such additional quantities but not be bound to do so.

"To take and keep an accurate check on all cement cars, as to quantity, and report same to the local office of said Hoy company. To exercise all possible diligence in the care of cement sacks, and when emptied tie the same in bundles in multiples of one hundred, ready for reshipment to the cement company.

"To unload all sand, gravel, rock or cement delivered for any one day, in such way and at such time as to protect the Hoy company from demurrage charges and if demurrage charges are assessed they shall be paid by the Placing company."

Then, after referring to the contract between the railway company and the Hoy company, it was provided that:

"The provisions of said contract between the Hoy company and the railway company, in so far as they relate to the part of the grade separation work covered by this contract, are made a part of this contract."

It will be noted from these two contracts that

"Material received at the work in car load lots will be set out on the most convenient spur track available east of Division street.

"If the railway company furnishes cement, storage room will be provided at some point east of Division street.

"The contractor shall unload all cars within 48 hours of receipt of same, or pay regular car demurrage. . ."

that

"The engineer will not permit the contractor to disturb or obstruct the track except as directed by the division superintendent of the railway company. . . ."

and that

"The Hoy company shall furnish all sand, gravel or crushed rock and cement required for all concrete work done in connection with said separation work delivered as follows: Sand and gravel or crushed rock f. o. b. cars in said city of Spokane as near as available railway trackage shall permit, to bunker, hopper or working sites of said Placing company, . . ."

It is vigorously contended by the appellants that the Hoy company was bound to deliver sand, gravel, cement and other materials at the bunker, hopper or working sites of the Placing company. We think it is plain from the language of these two contracts—which must be construed as one (*State ex rel. Noble v. Bowlby*, 74 Wash. 54, 132 Pac. 723)—that the Hoy company did not agree to furnish the sand, gravel, crushed rock or cement at the bunker, hopper or working sites of the Placing company unless railway tracks were *available* for that purpose. The record shows without dispute that a large number of cars of sand, gravel and cement were furnished by the Hoy company at the bunker, hopper and working sites of the Placing company when railway tracks were available. A few cars, during the year 1915, were not so furnished; but the contract of Hoy with the railway company is clear to the effect that the tracks and the traffic thereon were entirely under the control of the division superintendent. The railway company, in the original contract, very plainly indicated that the traffic over its line should not be interfered with, and, for that reason, the division superintendent had control of the tracks and the traffic there-

on. If he refused permission for the use of the railway or spur tracks, such tracks were clearly not *available* for use to the contractor or his subcontractors. It is no doubt true that the Hoy company, if it desired to do so, might have agreed that sand, gravel and cement would be delivered by it at particular places, such as at the bunker, hopper or working sites of the Placing company; but the Hoy company did not make that agreement, because the contract states that delivery of these materials shall be made

"as near as available railway trackage shall permit to bunker, hopper or working sites . . ."

This meant, of course, that, if *available trackage* would not permit, the Hoy company was not required to deliver the sand, gravel and cement at the working sites. When the division superintendent, in his letter in December, 1915, notified the contractor that he would not permit sand, gravel and cement to be delivered upon the tracks west of Division street, those tracks were then not available for that purpose, and consequently a delivery of the cars in the yards east of Division street was a delivery under the contract. This being true—and it seems no other reasonable construction of the contract can be indulged—it follows that the Placing company was not authorized to refuse to complete the concreting contract because the Hoy company did not deliver cars at the work sites. The appellants argue at length that there were delays in the delivery of materials in 1915. Such delays were caused partly, at least, by the fault of the Placing company. A careful reading of the abstract of the record fails to convince us that the trial court erred in finding that the Hoy company substantially performed its contract.

It is unnecessary to enter into a consideration of the different items in the accounting, upon which appel-

lants have written many pages of their brief, such as demurrage, insurance, pilot wages, water, failure to pay August estimate upon form contract, etc. Some of the items, considered in detail by the trial court, appear upon their face not to be justly chargeable against the appellants, but when explained, as they seem to be in the record, we are satisfied that the trial court arrived at a correct conclusion as to the allowance and rejection of items referred to in the briefs.

It is argued by the appellants that the Guardian Casualty & Guaranty Company is not liable upon its bond because the notice required in the bond was not given. The record shows that the Hoy company sent a notice by registered mail on March 23, 1916, to the Guardian Casualty & Guaranty Company at Salt Lake City, Utah, its home office. There was no agent in the city of Spokane upon whom notice could be served. On the next day, the Hoy company sent a telegram stating that the Placing company refused to proceed with its contract and that it would be necessary to commence work on the contract on March 27th, and asking the Guardian Casualty & Guaranty Company what it proposed to do. The Hoy company received no reply to either the notice or the telegram, and on the 28th day of March, 1916, took over the work and thereafter completed it. No effort was made to show that the Guardian Casualty & Guaranty Company would have taken over the work, or that it had made any effort to take over the work after notice was received by it of the refusal of the Placing company to proceed. It is plain, we think, that the surety was duly notified and had an opportunity to take over the work. We think it was the duty of the Guardian Casualty & Guaranty Company to proceed at once, upon the receipt of the notice, to take over the work or to notify the Hoy company of its intention to do so. It evidently determined

not to do so, and is liable, of course, for the damage which the Hoy company sustained by reason of the Placing company's not proceeding with the work.

Some contention is made by the appellants that, because extras were included in work which was done by the Placing company for the Hoy company, the surety was released. Extras were provided for in the contract, and this court has held that, in such cases, the doing of extra work by the contractor would not release the surety upon the bond. *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112.

A number of other points are discussed in the briefs, but our conclusion to the effect that the Placing company was not justified in refusing to carry out its work under the concreting contract, and was therefore in default of that contract, necessarily leads to the conclusion that the respondent is entitled to the damages resulting from a breach of that contract by the Placing company.

As we have intimated above, we are satisfied that the trial court correctly found the facts upon the different items in the accounting between the parties.

The judgment must therefore be affirmed.

ELLIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 14515. Department Two. May 10, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Albert M. Dearle et al., Respondent,* v. C. R. FRAZIER, *as Superintendent of School District No. 24 of Snohomish County, et al., Appellants.*[1]

SCHOOLS AND SCHOOL DISTRICTS—"RELIGIOUS" INSTRUCTION. The giving of credits for Bible study done outside of school, furnishing an outline of study, conducting examinations, and the rating of papers, covering the "historical, biographical, narrative and literary features of the Bible," violates Const., art. 1, § 11, providing that no public money shall be applied to any religious worship, exercise or instruction.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered June 26, 1917, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action in mandamus. Reversed.

Lloyd L. Black, Clifford Newton, and *John Sandidge,* for appellants.

Wm. A. Johnson, for respondent.

CHADWICK, J.—This cause is one brought by the petitioners below, respondents on this appeal, to compel appellants, by writ of mandate, to give petitioners an examination in the course of Bible study and to compel appellants to give them high school credits for graduation for such Bible study.

"A large proportion of the early inhabitants of this country were driven from their native homes by religious persecution, and sought an asylum in a savage wilderness, preferring hardships, privations and danger rather than to submit to any interference with their right to worship Almighty God according to the dictates of their own consciences. To Massachusetts

[1]Reported in 173 Pac. 35.

came the Puritans; to Rhode Island, the Baptists; to the Carolinas, the Huguenots; to Maryland, the Catholics; to Pennsylvania, the Quakers; while other denominations established themselves in different localities where they could enjoy this inestimable privilege, either alone or in comity with other tolerant sects.

"It was, no doubt, with a full consideration of the heterogeneous elements composing our nation, and the memory of the persecutions of their ancestors, that the people of all the states adopted constitutional safeguards against religious intolerance, and all but two of the original thirteen states declared a complete divorce between the government and creed. . . .

"This growth of public sentiment has continued until the adoption of our own constitution, the provisions of which on this subject are as broad, if not broader and more positive and more comprehensive, than similar provisions in any of the other state constitutions.

"This growth does not, however, indicate a decrease in religious sentiment among the people; these provisions have not been the work of the enemies, but of the friends of religion. It is not that the men who framed and the people who adopted these constitutional enactments were wanting in reverence for the Bible, and respect and veneration for the sublime and pure morality taught therein, but because they were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs; because that they were unwilling that any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent." 1 Opinions of the Attorney General, 142.

The provisions of our state constitution to which the *Attorney General* has attended, and which have a bearing upon our present discussion, are as follows:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Const., art. 9, § 4.

"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." Const., art. 1, § 11.

The question calling for the opinion of the Attorney General was:

"Can a teacher employed in the common schools of this state, without violating any law of the state or any provision of the state constitution, conduct devotional or religious exercises at the opening of the school day, or during any part of the school day as prescribed by law, by the singing of hymns or other sacred music, or by reading passages from the Bible, without comment, or by repeating or causing to be repeated, without comment, what is usually known as the Lord's Prayer?"

This opinion has ever been regarded as fair interpretation of the intent of the framers of our constitution and of the people who adopted it. It has been twice followed by succeeding Attorneys General. Opin. Atty. Gen. 1909-1910, p. 135; Opin. Atty. Gen. 1915-1916, p. 254. In the first instance, the query was:

"Has a teacher the legal right to open school each morning with a prayer?"

In the second instance, in answer to the query:

"May the directors of a school district prescribe a course of Bible study for high school students and grant school credits to apply toward graduation from such high schools to students who successfully pass examinations upon such course of Bible study, provided that such Bible study shall be optional and shall be pursued outside of the public school buildings, and that no part of the public school money, time or property be used in conducting such courses."

The Attorney General held that:

"The legal objection to the proposed system of Bible study is that the courses of study are made a part of the public school curriculum."

Many people sincerely believe that a cultivation of religious sentiment, which we may admit is essential to the development of an enlightened citizenship, should be a part of the education and training of the children of our country, and they as firmly believe that the version of the Bible, which is accepted and acknowledged by the great majority of the citizens of this country, should be made the vehicle of that development. They believe that the constitution can have no application unless an attempt is made to advance the doctrine of a particular denomination or to instil the dogma of sect in the mind of the pupil. Consequently it has been resolved by assemblies of teachers in this country and other countries that a course in Bible study should be a part of school work.

In 1915, the state board of education adopted the following resolution:

"Since the board looks with favor upon allowing credits for Bible study done outside of school, it is moved that a committee be appointed to consider a plan for allowing such credits, one-half credit to be given for Old Testament, and one-half credit for New Testament, on the basis of thirty to thirty-two credits for high school graduation, and that a syllabus of Bible study be issued under the auspices of the state department of education with rules and regulations for the distribution of examination questions at least once a year."

The plan thus outlined is in effect, so we are informed by counsel, in Spokane, Tacoma, Centralia, Sunnyside and Everett, from whence this case comes. To make the plan feasible and to avoid the rock of the constitution, as we may well presume, the school board adopted the following resolution:

"Resolved, By the board of education, Everett, Washington, that high school credit for Bible study may be allowed to the members of the Everett high

school to the extent of one credit on Old Testament scriptures and one credit on New Testament scriptures, under the following conditions:

"First—Credit shall be granted only after successfully passing an examination covering the historical, biographical, narrative and literary features of the Bible, and based upon an outline to be hereafter adopted by the board of education.

"Second—Supervision of instruction in Bible shall not be undertaken by the high school beyond the furnishing of a syllabus or outline and the setting of examination, rating of papers and determining of credit.

"Third—It is contemplated that all personal instruction and interpretation shall be given in the home or by the religious organizations with which the students are affiliated, following the outline furnished by the board of education.

"Fourth—Not more than one credit in Bible shall be allowed an individual in any one school year.

"Fifth—It is assumed that this work will require the equivalent of one 45 minute lesson per week through the school year and the equivalent of three hours per week in outside study."

Authority for this resolution is found by counsel in the resolution of the state board of education, and in the code.

"Every board of directors of a school district of the first class shall . . . have the power: Second, To prescribe a course of study and a program of exercises which shall not be inconsistent with the course of study prepared by the state board of education, for the use of the common schools of the state. . . . Fourth, To adopt and enforce such rules and regulations as may be deemed essential to the well-being of the schools, and to establish and maintain such credits and departments, including night, high, kindergarten, manual training and industrial schools, . . . as shall, in the judgment of the board, best promote the interests of education in that district." Rem. Code, § 4509.

Counsel for respondent bases his argument upon two propositions—

First: The resolution does not establish or maintain

any school system which is under sectarian control or influence.

Second: There is no expenditure of public funds for any religious worship, exercise or instruction, or for the aid or support of any religious establishment.

The first premise will be dismissed, not because it will not bear argument, for there is much argument and authority on either side, but because the case can be determined by reference to the second premise alone.

The framers of the constitution were not content to declare that our public schools should be kept free from sectarian control or influence; they went further and made it certain that their declaration should not be overcome by changing sentiments or opinions. They declared that "no public money or property shall ever be appropriated or applied to any religious worship, exercise or instruction," and in this respect our constitution differs from any other that has been called to our attention.

It has been held in several of the states that the reading of the Bible, or the ten commandments, or the recital of the Lord's Prayer, without comment or remark, does not violate a constitution providing that no person shall be compelled to attend or support any place of religious worship, or to pay taxes for the support of any minister of the Gospel or teacher of religion, or that no public moneys shall ever be used for sectarian purposes, or for the support of sectarian schools, or equivalent expressions. *Church v. Bullock,* 104 Tex. 1, 109 S. W. 115, 16 L. R. A. (N. S.) 860; *Pfeiffer v. Board of Education of Detroit,* 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536; *Billard v. Board of Education of Topeka,* 69 Kan. 53, 76 Pac. 422, 105 Am. St. 148, 66 L. R. A. 166; *Moore v. Monroe,* 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444.

But these cases are based upon provisions that go no further than art. 9, § 4, of our constitution. Their purpose is to prevent the teaching of any of the beliefs, creeds, doctrines, opinions, or dogmas of any sect, and to prevent the appropriation of money for parochial and denominational schools, a privilege that had been abused by the legislatures of some of the states, and of which the people were no doubt mindful at the time our constitution was adopted. In the light of other constitutions, the abuses in other states, and the evident purpose of the framers of the constitution to save some of the questions which had there arisen, there can be no doubt that more was intended than a simple declaration that our schools should be kept free of sectarian influences. Article 1, § 11, is all significant. The words "No public money shall be appropriated for or applied to any religious worship, exercise, or instruction" are sweeping and comprehensive.

Our inquiry may be limited, then, to the one question, whether an examination of pupils upon "the historical, biographical, narrative, and literary features" of the Bible is religious instruction within the meaning of the constitution. To meet the premise of counsel for respondent, we would have to read the prohibition as if it were "No public money shall be applied to any *denominational* or *sectarian* worship, exercise, or instruction," and reject the broader term "religious;" for his argument proceeds as if the sole object of the constitution was to keep the schools free of sectarian influences. While selections such as the Lord's Prayer, the Twenty-third Psalm, and the Sermon on the Mount are regarded as masterpieces of literature and inspiringly grateful to a thirsty soul, they are calculated to invite or excite the youthful mind to inquiry and the elder to resentment, for some, the Jew for instance, while accepting the Twenty-third Psalm, might reject

the Lord's Prayer and the Sermon on the Mount as the work and words of one whom he regards as an impostor. Then, too, the Twenty-third Psalm, as we understand it, is not the Twenty-third Psalm in the Douay Bible, but the twenty-second. Neither is the translation the same as in our own Bible. Nor is the Lord's Prayer translated in the same way. These objections, to many of us, would seem light and trivial, but history has been made over the controversies that have arisen out of such as these, and that such innocent uses of the Bible has lead to civil strife and discussion is abundantly proved by the cases to which we have referred.

We have, then, not only "religious exercises" and "instruction" which is prohibited, but their natural consequence—religious discussion and controversy. The most ready and popular argument for the avoidance of these constitutional provisions has been that, whereas the Bible inculcates a code of morality which, if understood and practiced, will make for better citizenship, and whereas it is essential that the youth should be impressed with an understanding of the fundamental principles of right and wrong and thus grow in moral stature, Bible instruction by reading selected passages without comment can do no violence to the constitution, no hurt to the principle of divorcement of church and state, and that it should be, therefore, not only tolerated, but encouraged. *Hackett v. Brooksville Graded School District,* 120 Ky. 608, 87 S. W. 792, 117 Am. St. 599, 69 L. R. A. 592.

It is upon this case and those cited above that counsel relies, and as paradoxical as it may seem, our best authority for rejecting the doctrines announced is to be found in the cases themselves. Quickly put, they distinguish religion in its broader sense from the dogmas, creeds or opinions of sect, and hold that, although the Bible may be the text-book of every sect, yet in its

history, narrative, biography and its moral persuasions, it serves no sect, but, on the contrary, is a spiritual stimulant in every individual, whether he be a Jew or a Gentile, a Catholic or a Protestant, a Moslem or a Buddhist, a Christian or a Pagan, a believer or an atheist. That the study of the Bible for its historical, narrative, biographical, or literary features serves the religious impulse and the ends of those who would aid the growth of religion as distinguished from mere sect is acknowledged.

"Every pupil who enters a public school has a right to expect, and the public has a right to demand, of the teacher that such pupil shall come out with a more acute sense of right and wrong, higher ideals of life, a more independent and manly character, a higher conception of his duty as a citizen, and a more laudable ambition in life, than when he entered. The system ought to be so maintained as to make this certain. The noblest ideals of moral character are found in the Bible. To emulate these is the supreme conception of citizenship. It could not, therefore, have been the intention of the framers of the constitution to impose the duty upon the legislature of establishing a system of common schools where morals were to be inculcated and exclude therefrom the lives of those persons who possessed the highest moral attainments." *Billard v. Board of Education of Topeka, supra.*

It will thus be seen that the cases cited were dealing only with the question whether the reading or study of the Bible might be a sectarian influence, and not with the question whether such reading or study was religious instruction. To prove that it is not sectarian instruction, they affirm that it is no more than religious or moral instruction; and so affirming, logically hold that, if their constitutions had been such as ours, they would have held to the contrary.

But it is said that the teaching is to be upon the historical, biographical, narrative, and literary fea-

tures of the Bible only, and in this the instruction will be neither sectarian, doctrinal, denominational nor religious. This might be true if all citizens were agreed that the King James' translation of the Bible is a true version of the scriptures, and then only if the teaching were under the control of those who are selected through the means and methods provided by law. But the vice of the present plan is that school credit is to be given for instruction at the hands of sectarian agents. Then, too, all citizens are not agreed as to the narrative and historical worth of the Bible. It is true that some of the events there recorded have shaped the destinies of millions of people, yet they are not mentioned in profane cotemporaneous history. Some are not agreed whether many of the events there narrated are historical or allegorical; whether the earth was created in six days; where Cain obtained his wife; whether the whole earth was covered with a flood of waters; whether Jonah was swallowed by a whale; whether Elijah was translated by a whirlwind into heaven; whether Lot's wife was turned into a pillar of salt; whether our God stopped the sun in its course that Joshua might overcome his enemies; whether he made the waters of the sea to recede that his chosen people might pass to the promised land; whether God spake with the prophets, or ordered the lives of such great rulers as David and Solomon; are questions all sounding in narrative and history that have excited differences and controversies that are never settled.

That Bible history, narrative, and biography cannot be taught without leading to opinion, and ofttimes partisan opinion, is understood and anticipated by the school board. They admit, as plainly as language can admit, that Bible teaching does lead to sectarian opinion and differences of opinion upon religious questions. They employ the word "religious" in a narrow and

sectarian sense. They speak of "religious organizations" and provide that "interpretation" shall be given in the home, or by some "religious organization."

Now we had thought that "history, biography and biblical narrative" would require no interpretation—certainly no interpretation calling for the doctrinal opinion of a religious organization. And who of authority in our schools is to say that a pupil shall, or shall not, have credit if he answers questions in a way that is different from the way intended by those who prepared the course of instruction. It may be said that the pupil is entitled to credit if he answers in a way that is consistent with the faith of his instructor. But there are two objections to this. The one is that the examiner may not know the faith and teachings of those of a different faith; the other and more conclusive objection is that, to give a credit in the public school for such instruction, is to give a credit for sectarian teaching and influence, which is the very thing outlawed by the constitution.

"Courts have been zealous in protecting the money set apart for the maintenance of the free schools of the country. They have turned a deaf ear to every enticement and frowned upon every attempt, however subtle, to evade the constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail." *School District No. 20 v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033.

In that case it was sought to justify the expenditure of school money for the instruction of children outside the public schools. The logic of our opinion is that instruction upon all subjects proper for the advancement or credit of a pupil should be given within, and not without, the schools, or, at least, under the immediate tuition of a teacher who has qualified to teach under the laws of this state.

The plan for the education of our youth as outlined by the legislature indicates that it had no intention of ever providing credit for work done under the tuition of any one who had not been licensed to teach by the school authorities.

"No teacher shall be accounted as a qualified teacher . . . who is not the holder of a valid teacher's certificate, or diploma issued by lawful authority of this state." Rem. Code, § 4543.

The law provides, Rem. Code, § 4550, that it shall be the duty of the teacher to impress upon the minds of the pupils morality, truth, etc. It would seem that the legislature would have declared in words that the Bible should be regarded as a text-book, and that credits could be given for study outside the school and under those not holding either teacher's certificate or diploma, if it had so intended.

It is no more than a subterfuge to urge that the public moneys will not be applied for religious instruction because the teaching is done outside the school by a preacher or priest, or in the home of the pupil, or by a religious organization with which the student may be affiliated, for the time of the teachers, as well as their technical skill, will be consumed while under the pay of the state in furnishing the syllabus or outline, the conducting of examinations, the rating of papers, and the determining of proper credits.

There are many cases in the books upon the questions herein discussed, but none of them have reference to a constitutional provision exactly like our own. They are collected in the several series of selected cases. *Pfeiffer v. Board of Education of Detroit,* 42 L. R. A. 536; *Church v. Bullock,* 16 L. R. A. (N. S.) 860; *State ex rel. Weiss v. District Board of School District No. 8,* 7 L. R. A. 330; *County of Cook v. Industrial School for Girls,* 8 Am. St. 386, 414; *People ex*

rel. Ring v. Board of Education, 19 Ann. Cas. 220; 35 Cyc. 1127.

The following cases, however, support our views: *State ex rel. Weiss v. District Board of School District No. 8,* 76 Wis. 177, 44 N. W. 967, 20 Am. St. 41, 7 L. R. A. 330; *People ex rel. Ring v. Board of Education of District 24,* 245 Ill. 334, 92 N. E. 251, 19 Ann. Cas. 220, 29 L. R. A. (N. S.) 442.

We shall not go far afield when we suggest that it is a matter within the common knowledge of those who followed the discussion attending the framing of our constitution that it was the purpose of the men of that time to avoid all of the evils of religious controversies, the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states. For it was known that religious opinion is a thing that men will fight for, and sometimes in most insidious ways. The question then was—and the people who adopted the constitution were so advised —whether we should adopt a constitution which provided in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools.

To compromise opinion in these matters is to lead to confusion which would make the courts the arbiter of what is and what is not religious worship, instruction, or influence, which would be as intolerable to the citizen as it would be to leave a decision to a school board. To this end the supreme court of Iowa had lead the law, as witness their halting after declaring that their constitution did not interdict Bible reading. They say, "It is perhaps not to be denied that the principle carried to extreme logical results might be sufficient to sustain the appellant's position," which means no more than this—the courts will say how far you may go in matters of this kind, whereas, if the right or prohibi-

tion be in the constitution, there is no middle ground, no twilight zone for the courts to explore. It is either a right, or a prohibition. Then, too, witness the illogic of the Kentucky court in *Hackett v. Brooksville Graded School District,* 120 Ky. 608, 87 S. W. 792, 117 Am. St. 599, 69 L. R. A. 592. It says: "The Book [meaning the Bible] to the sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents." Notwithstanding it is known of all men that the rock upon which the religious opinions of men have split is the "word," and that every sect is able to sustain itself, at least to its own satisfaction, by reference to the literal word of the Bible. It is the other sect that is the victim of partial interpretation.

In disregard of the deeper reasons which prompted the people to take some security against the breeding of religious controversies in schools supported by the public school funds—reasons adverted to in many of the decisions—some courts, as it seems to the writer of this opinion, have inclined to the letter rather than to the spirit of the constitution. To illustrate, the supreme court of Nebraska held their constitution, providing that: "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes," forbade the reading of passages from King James version of the Bible, the singing of religious songs, and songs sung in "Orthodox Evangelical Churches," and the offering of prayer in accordance with the customs or usages of sectarian churches or religious organizations. On rehearing, evidence was quoted to show that the first opinion of the court was well founded upon the facts of the case at hand. The court met the vigorous assault made upon the first

opinion by declaring that "the decision does not however exclude the Bible from the public schools. It goes to the exent of denying the right to use it for the purpose of imparting sectarian instruction," and to quote from the syllabus prepared by the writer of the opinion on rehearing:

"The courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. . . .

"Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities, but whether the practice of Bible reading has taken the form of sectarian instruction is a question for the courts to determine upon evidence.

"It will not be presumed in any case that the law has been violated; every alleged violation must be established by competent proof." *State ex rel. Freeman v. Scheve,* 65 Neb. 853, 877, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

There is another reason for our holding which is not suggested in the briefs, but it nevertheless seems forceful to the writer. It is, that neither the board of education nor the school board has undertaken to define the meaning of the word Bible. It may be said that they did not have the Jewish Bible in mind, for credit is provided for instruction and examination in the New Testament, but we apprehend that this would not be binding on a Jewish school board. It would be free to prescribe the Talmud. A school board made up of Protestants would have in mind and provide for instruction and examination in the King James' version. A board made up of Catholics would, no doubt, insist upon the use of the Douay Bible, while a board made up of Lutherans would hold the pupil to the translations of Luther.

"For more than three centuries it has been the boast and exultation of the Protestants and a complaint and grievance of the Roman Catholics that the various translations of the Bible, especially of the new Testament, into the vernacular of different peoples, have been the chief controversial weapons of the former and the principal cause of the undoing of the latter. For making such translations Wyclif, Luther, Tyndale, and others have been commended and glorified by one party, and denounced and anathematized by the other. Books containing such translations have been committed to the flames as heretical, and their translators, printers, publishers, and distributors persecuted, imprisoned, tortured, and put to death for participating in their production and distribution. The several popular versions differ in some particulars from each other, and all differ from the Catholic canon, both in rendition of passages from which sectarian doctrine are derived by construction and in the number of books or gospels constituting what is regarded as the written record of Divine revelation. In addition to this, there are persons who are convinced, upon grounds satisfactory to them, that considerable parts of the writings accepted by all Protestant denominations are not authentic, while devout Hebrews maintain that the New Testament itself is not entitled to a place in the true Bible." *State ex rel. Freeman v. Scheve,* 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

And it is not beyond the realm of imagination to believe that the framers of our constitution foresaw the possibility of a school board divided in its religious beliefs.

Another reason which strengthens our opinion is that the people amended art. 1, § 11, at the general election in 1904, by adding the words "provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified." We regret that we have not been able

to find the history of this amendment, but the time we are able to give to this opinion will not admit of further search. It would seem, however, that the people were satisfied with the construction given the article by the *Attorney General.* The proviso makes specific provision, and a rule of interpretation that excludes a like interpretation of the other parts of the article.

The resolution provides that the syllabus or course of study is to be made up by the school board. What guarantee has the citizen that the board, having a contrary faith, will not inject those passages upon which their own sect rests its claim to be the true church under the guise of "narrative or literary features;" and if they did so, where would the remedy be found? Surely the courts could not control their discretion, for judges are made of the same stuff as other men, and what would appear to be heretical or doctrinal to one may stand out as a literary gem or as inoffensive narrative to another, and thus the evil at which the constitution is aimed would break out with its ancient vigor. If the sentiment of the people has so far changed as to demand the things sought to be done, the remedy is by amendment to the constitution.

Being controlled in our judgment by our conception of the constitution, we are constrained to reverse the judgment of the court below and to remand the case with directions to deny the writ.

ELLIS, C. J., FULLERTON, and MOUNT, JJ., concur.

HOLCOMB, J. (concurring)—I do not agree with, and see no need of, many of the observations and much of the controversial discussion contained in the prevailing opinion.

The state constitution, art. 1, § 11, contains the specific and positive inhibition:

"No public money or property shall be appropriated for or applied to any religious worship, *exercise, or instruction.*"

That is plain, simple and mandatory, and by it the legislature, school authorities and courts are bound. The school authorities are forbidden to apply any of the public money or property to any religious exercise or instruction. The curricula of the public educational institutions cannot be made to include any kind of religious worship, *exercise, or instruction.* The language is most comprehensive and argues itself.

For that sole and sufficient reason, I am bound to, and do, concur in the result.

[No. 14554. Department Two. May 10, 1918.]

WILLIAM R. CRAWFORD, *Plaintiff*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY *et al., Defendants.*

SCOTT CALHOUN *et al., Respondents and Cross-Appellants*, v. AUGUSTUS S. PEABODY, *Trustee, et al., Appellants.*[1]

RECEIVERS—COMPENSATION—AMOUNT. Two receivers of an interurban railway will be allowed a compensation of $500 per month each, not on a percentage basis which is obsolete, but in view of the amount involved, the obligations attending it, the amount of the bond required, the time spent, labor and skill needed, the fidelity to details, the expedition of administration, and the character of the accounting; it appearing that both the receipts and disbursements were over $1,200,000, the management efficient, much construction work done, and a great deal of important litigation conducted.

Cross-appeals from an order of the superior court for King county, Frater, J., entered July 24, 1917, fixing the compensation of receivers and approving their final accounts. Reversed.

[1]Reported in 173 Pac. 32.

Higgins & Hughes (Hyman Zettler, of counsel), for appellants.

Scott Calhoun and *John A. Homer,* for respondents.

HOLCOMB, J. — This is an appeal by the principal creditors, and also the receivers, of the Seattle, Renton & Southern Railway Company, from an order fixing the receivers' compensation and approving their final accounts.

Various phases of this litigation have been before the courts before. See *Crawford v. Seattle, Renton & Southern R. Co.,* 71 Wash. 77, 127 Pac. 594; 86 Wash. 628, 150 Pac. 1155, L. R. A. 1916D 732; 92 Wash. 670, 159 Pac. 782; 97 Wash. 70, 165 Pac. 1070; 97 Wash. 651, 167 Pac. 44; *Crawford v. Gordon,* 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C 516; *Seattle, R. & S. R. Co. v. Seattle,* 216 Fed. 694.

The principal creditors appealing are the bondholders of the Seattle, Renton & Southern Railway Company. They assign errors of the court below as follows: (1) In allowing receiver Parkin the sum of $7,305, or any sum at all in excess of $21,061.29, theretofore received by him as compensation as receiver; (2) in allowing receiver Calhoun the sum of $7,305, or any sum at all in excess of the $21,083.87 theretofore received by him as compensation as receiver; (3) in approving that portion of the receivers' final accounts which covered the payment to receiver Parkin of the sum of $2,695 in addition to the sum of $366.29 theretofore received by him as compensation as receiver; (4) in approving that portion of the receivers' final accounts which covered the payment to receiver Calhoun of the sum of $2,695 in addition to the sum of $18,388.87 theretofore received by him as compensation as receiver; (5) in approving the receivers' final accounts without requiring them to return to the trust fund the

amount of the loss they had recklessly and wrongfully inflicted upon that fund by their deposits in the bankrupt Northern Bank & Trust Company.

No assignment of error is made by the receivers on their appeal, but it is contended by them generally that the amount of compensation allowed them is inadequate for the services rendered and that further allowance should be made by this court.

Many assertions are made in the briefs on behalf of the bondholders as to the reckless, wasteful and partisan character of the services for which the receivers were allowed an aggregate of over $56,000 out of the trust funds passing through their hands. It is somewhat bitterly contended by them that the proceedings throughout were unduly delayed by the receivers by reason of their conduct of affairs and of their occasioning much litigation which, the bondholders contend, was unnecessary or unjust; and of their not winding up the receivership much earlier. It is also contended that they acted in collusion with Crawford, the plaintiff in the original proceedings, in various matters to the detriment of the creditors. We shall not concern ourselves greatly with these contentions, but shall deal only with the facts involved. The receivership was instituted upon a complaint of Crawford and these receivers appointed by the state court. They took possession under their appointment on August 31, 1912, and continued the active daily operation, management and control of the properties until June 10, 1916, at which time the property passed to the purchasers under judicial sale thereof. After June 10, 1916, they continued in the possession of the remaining funds in their hands until April 23, 1917, when the hearing in the court below was begun on their final report and petition for discharge, which culminated on July 24, 1917, in an order approving their final accounts and

payments and directing the further payments heretofore referred to in the assignments of error. These further payments were subject to deductions, in the case of Parkin, of the sum of $200, money paid to him, and in the case of Calhoun, $715.75.

The property passing into the hands of the receivers at the time of their appointment consisted of a street and interurban electric railway running from Stewart street, in the city of Seattle, south to Renton, Washington, a distance between termini of thirteen and one-half miles. The total cash receipts of the receivers amounted to $1,249,185.61, and the total disbursements aggregated $1,207,181.95. Shortly before the sale of the property, it was appraised by an expert appraiser of public utilities at the sum of $1,600,000. It was sold by the receivers in March, 1916, at public auction, at a minimum price fixed by the court in the sum of $1,200,000.

Prior to the time these receivers took possession, there was a receivership pending in the United States district court wherein receivers were appointed; but the state court having obtained jurisdiction first under the complaint of Crawford, the Federal court relinquished jurisdiction and the Federal receivers were discharged.

At the time the receivers took possession, there was pending in the state courts certain litigation which they thereafter conducted, which was ultimately carried to the supreme court of the United States. There was also pending an action by the city of Seattle to change the grades and to condemn a portion of the company's right of way route. This litigation was also conducted by the receivers through the lower court to this court, and a subsequent action was brought by them in the Federal court to enjoin the city from interfering with the right of way of the company and for damages, re-

sulting in an award against the city of $41,000. Much litigation was also conducted by the receivers on behalf of the company against the bondholders, through the state and Federal courts. Considerable litigation in the court below was had upon the many claims against the property and against the receivers. Many hearings were had before the public service commission, involving questions within its jurisdiction, and before the city council; all of which, the receivers contend, added to the burdens of their duties and enhanced the value of their services.

It is shown that, at the time the receivers took possession of the property, the right of way, roadbed, and equipment were in a run-down, dangerous and unsafe condition, while the property and equipment, when turned over by the receivers to the purchaser, were in first-class shape in every respect, and no objection has been made to the condition of the road and the equipment as left by the receivers. During their operation of the property, new passenger and freight cars were purchased and paid for, and equipment was purchased for a new sub-station, generators, and apparatus. A considerable amount of regrade work was done during the period of the receivership, which undoubtedly increased the cost of operation materially. The cost of operation per car per mile under the receivers was eighteen cents, while the cost of operating similar properties in the state of Washington runs as high as twenty-eight cents per mile. Much complaint is made by the bondholders as to the cost of the operation under the receivers, but we think this showing alone is sufficient to answer all their complaints.

The compensation allowed by the court below to the two receivers amounts to a little less than $1,200 per month, or a little less than $600 each. Expert witnesses on the question of compensation, on behalf of the bond-

holders, fixed the reasonable compensation of the receivers at from $7,500 or $8,000 to $10,000 per year for both. Expert witnesses, who were perhaps equally competent on the question of compensation on behalf of the receivers, fixed the reasonable compensation that they should receive at from $750 to $1,000 each per month. An operating general manager of an electric railway system, testifying as an expert on behalf of the bondholders, fixed the reasonable compensation to be allowed the general manager and superintendent of the property managed by the receivers at $5,000 per annum, and stated that, in addition to that compensation, such general manager should have a superintendent to look after the details of operation, whose salary should be from $2,500 to $3,500 per annum. This compensation was based by him upon the assumption that the general manager and the superintendent had steady positions, and did not take into consideration the additional responsibility and uncertainty of tenure of receivers. It is incontrovertibly shown that one Mills, a partner in the firm of Peabody, Houghteling & Company, one of the appellants herein, was one of the receivers appointed in the Federal court during the time the receivership was pending there, and testified under oath in the Federal court that a reasonable and fair compensation to be allowed the receivers for the period of the receivership in that court from May 14 to August 29, 1912, was $1,000 per month each for the receivers, of whom there were two, and $1,500 per month for attorney's fees, making a total of $3,500 per month. The order of the Federal court entered August 29, 1912, fixed the compensation of the Federal court receivers at $750 per month, and $750 per month for the attorney. Those receivers did not have charge of the multifarious litigation, much of which was unavoidable,

and the extended operation of the property which the permanent receivers in the state court have had.

It is contended, however, by the bondholders that these receivers were appointed by the state court upon the supposition that Parkin would attend to the operation of the property and Calhoun to the legal business and litigation of the company, and that in all the litigation many other attorneys have been employed and allowed considerable attorneys' fees out of the trust fund for conducting litigation either in association with, or independently of, receiver Calhoun, and that, therefore, receiver Calhoun's services as a receiver had been practically of no benefit to the trust. But the receivers were appointed by the court apparently upon an equal basis and with equal authority and responsibility. There is nothing in this record, and we can conceive of nothing, that divided the duties imposed upon the receivers or the value of their services.

It was shown by the bondholders that receiver Parkin had never received a salary, previous to his appointment as a receiver, greater than $200 per month, and that it is inconceivable that his ability as receiver is more than double his ability in any other employment previously. This is not a proper conclusion either.

"The considerations that should be controlling with the court in fixing compensation [of receivers] are the nature of the matter administered, the amount involved, the obligations attending it, the amount of the bond required, the time spent, the labor and skill needed or expended, the degree of success attained under all circumstances, the fidelity to details, the appreciation evidenced as to the responsibilities of the position, the character of such responsibilities, the expedition with which the trust has been administered in view of results reached, and the method, character, and promptness of the accounting, having regard as a standard, to

what is paid for somewhat similar services in the performance of official duties, *not the standard in private business transactions.* [Italics ours.] The amount of a receiver's compensation does not depend upon the special qualifications or standing, of the person appointed, or the demands made upon his time by private business; nor yet upon the estimates that persons who are themselves in receipt of an ample income may put upon his services from the standpoint they occupy. The value of the services rendered should not be considered generally, but only with reference to the trust administered. Where a receiver is a manager as well as a receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. In consequence railroad receivers are usually compensated more liberally than other receivers, although extravagance should be avoided." 34 Cyc. 472.

It is also stated in the same work, at page 474, that,

"A receiver's compensation is sometimes computed by giving a percentage of his receipts and disbursements. In some states the rate of commission is fixed by statute; in others it is regulated by the courts. Five per cent on the amount received and disbursed by a receiver seems to be the customary amount for his compensation."

The five per cent allowance, however, is generally made only where the trust property administered is comparatively small, and where it is comparatively large the courts have reduced the percentage to as low as one per cent unless fixed by statute. 34 Cyc. 474; Beach, Commentaries on Law of Receivers, §§ 759, 766.

Cyc. also states the rule to be in several jurisdictions where there is no statutory compensation for receivers, to follow by analogy the rate of compensation allowed executors, guardians and trustees, and that rate of compensation is urged by the receivers in this case.

But we held in *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536, that the percentage method of compensating receivers was obsolete, and refused to follow the basis of compensation fixed by statute in this state for executors and administrators. The railway system was a comparatively short one. The receivers had a somewhat lengthy term.

In view of the fact that the responsibility for conducting the legal proceedings and litigation in which the receivers and the property were involved was in almost every case divided with other attorneys, who received ample compensation out of the funds of the trust, and of the fact that the responsibility for operating properties was divided between two receivers, we can see no just reason for allowing the two receivers any greater sum than $500 each per month for the period during which they actively operated the property, or until June 10, 1916. We think that compensation is ample and just to all the parties, in view of all the conditions of the property and the services of the receivers under the facts before us; and that one-half that sum, or $250 each per month, is an ample allowance to be made to them during the time, after they ceased to control and operate the railway—ten and one-half months—that they had custody and responsibility of the funds remaining in their hands until their submission for final discharge. From these sums are to be deducted the sums which the court found each had received. The amount of loss of funds deposited by the receivers in the Northern Bank & Trust Company is a balance of $5,656.56, and this the receivers admit they are liable for and offer to pay. It will be ordered that they pay that sum into court, or any balance remaining after paying their remaining allowances.

The order appealed from is therefore reversed, with

instructions to enter a judgment in conformity herewith, and the creditor appellants to recover costs of appeal.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 14735. *En Banc.* May 10, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Eleanor Davies, by her Guardian etc., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Calvin S. Hall, Judge, Respondent.*[1]

HIGHWAYS—ESTABLISHMENT—NOTICE—TO MINORS—JURISDICTION—EMINENT DOMAIN. Under Rem. Code, § 5633, requiring notice to be given to property owners of proceedings by county commissioners to establish a county road, the court acquires no jurisdiction of eminent domain proceedings to condemn the land of a minor for whom no guardian *ad litem* was appointed in the preliminary proceedings, since notice of the hearing as to the necessity and route and award of damages by the commissioners was jurisdictional as to such minor; and the objection is available on certiorari to review the proceedings in eminent domain (PARKER, MOUNT, and MAIN, JJ., dissenting).

Certiorari to review an order of the superior court for King county, Hall, J., entered March 16, 1918, adjudging a public use and necessity, in proceedings to condemn land for a county road. Reversed.

Geo. H. Rummens, for relator.

Alfred H. Lundin and *Wm. J. Steinert,* for respondent.

MACKINTOSH, J.—The relator, Eleanor Davies, is a minor and is the owner of an undivided interest in certain real property in King county. The board of county commissioners of King county, acting under

[1]Reported in 173 Pac. 189.

the law giving them power to lay out and open county roads (Rem. Code, § 5623 *et seq.*), received the report of the county engineer, and fixed a time for the hearing of the report under § 5633, and attempted to cause notice of such hearing to be given the owners of the land to be taken. Had the relator been under no disability, the service of the notice would have been valid, but no guardian had ever been appointed for her. The county commissioners proceeded to a hearing on the report, and having heard and considered testimony for and against the establishment of the road and as to the amount of damages which should be awarded, thereupon passed a resolution declaring a public necessity for the construction of a public road across the relator's land, and fixed the damages for the taking of the relator's land in the sum of one dollar, and tendered that amount to her. The award of damages not being accepted, the board of county commissioners thereafter directed proceedings to procure the right of way to be instituted in the superior court, and a guardian *ad litem* having been appointed for the relator by the court, through him she comes here, questioning the validity of the proceedings by this writ of review.

When the law provided that a property owner should have notice of the proceedings before the county commissioners in regard to the establishment of public roads it meant, and could only mean, that notice must be given to one competent to respond thereto and to one who would be bound thereby. The minor, in response to such notice, could neither bind herself nor be bound by any action of the county commissioners at their hearing.

We have held that,

"in proceedings under the law . . ., the petition is not relied upon as notice to the landowners as to

the exact route the road will finally take. Specific notice to the landowner is now given and he is accorded a hearing before the board on that question. The reference in the petition to terminal points and course is no longer jurisdictional." *State ex rel. Havercamp v. Superior Court,* 101 Wash. 260, 172 Pac. 254.

This minor has had no opportunity to be heard as to the route of the proposed highway that has been established at a hearing where she, on account of her disability, has had no standing. She could not be heard as to the necessity for the establishment of the road nor as to the amount of damages which should be awarded her, nor has she even been able to accept or reject the award proffered her, and the determination of public use has been made without her having the ability to object thereto or acquiesce therein. All the preliminary acts necessary to give the court jurisdiction have been done against one whose voice could not be raised in her own behalf, and yet it is attempted to bind her by these acts. When considering the lack of notice to a wife in a hearing before the county commissioners involving the establishment of a road across community property, we said:

"If there is any merit in the notice of the action of the county commissioners which is to be given, it is that the rights of the owners may be there announced, and, under the theory that it is not necessary for the wife to have notice of the proceedings before the commissioners, the husband could consent to the award which is offered, and the wife would be estopped from questioning it. It was not the intention of the law to thus deprive owners of land, whether wives or husbands, of their property without notice. The right of eminent domain is an arbitrary right, and, before owners' property can be subjected to the use of the public, notice must be given of all the essential steps." *Chehalis County v. Ellingson,* 21 Wash. 638, 59 Pac. 485.

Certainly, if a wife's property cannot be condemned where she has failed to receive notice of the proceedings preliminary to the condemnation suit, much less can the minor in this case have her property subjected to condemnation when, at the commencement of the action before the county commissioners, she was under a legal disability. The appointment of a guardian for her, followed by proper service of the notice of the hearing before the board, would have made possible the necessary preliminary steps before the board and have given the court jurisdiction. Jurisdiction never having been obtained, the order of the board was void and open to attack in this proceeding.

The action will be remanded to the superior court with directions to dismiss.

ELLIS, C. J., HOLCOMB, FULLERTON, CHADWICK, and WEBSTER, JJ., concur.

PARKER, J. (dissenting)—I cannot see my way clear to concur in the foregoing opinion. It seems to me that my learned brother Mackintosh, and those concurring with him, have not fully appreciated the distinction between the preliminary proceeding before the county commissioners and the eminent domain proceeding thereafter in the superior court.

The proceeding before the county commissioners is not a judicial proceeding involving any constitutional due process of law guaranty, but is a mere administrative proceeding. It does not result in the taking of anyone's property, except it be by consent of an owner who is capable of consenting thereto. Its only purpose is to determine the location of the proposed highway and what amount of compensation for rights of way through private property shall be offered to the respective owners thereof. It is too elementary to require citation of authorities that the statute need not

require any notice to any one in that proceeding, in so far as due process of law is concerned. The legislature could have entirely dispensed with notice thereof and authorized the commissioners to decide these questions without any hearing of owners of the property through which the highway should be located. It follows as a matter of course that the legislature could have required a mere publication notice, or any other notice of as meager a character as it deemed wise to provide for.

Of course, this is not true of the eminent domain proceeding in the superior court, because that is a pure judicial proceeding under our constitution, which results in a judgment divesting an owner of property for public use, wherein notice in the nature of a summons must be issued and served in such manner as to satisfy the constitutional due process of law guaranty; but it is not claimed here that our statutes do not provide for such notice, nor that our statutes do not provide for the representation of a minor or other incompetent defendant in such proceeding by a guardian; nor is there any sound ground for contending that such notice was not issued and served upon this minor, or that she is not being represented by a proper guardian in this eminent domain proceeding. We have numerous statutes providing for the representation in judicial proceedings, including eminent domain proceedings, of minors and other incompetents by guardians, as in sections 188, 1564, 1644, 7781, 8829, and other sections of Rem. Code, but there is no provision in our county road law providing for the appointment of a guardian, either general or *ad litem,* to represent a minor owner in the proceeding before the county commissioners, or making it the duty of the county commissioners to see that a minor or other incompetent person is represented in the preliminary administra-

tive proceedings before them looking to the location of the highway and the making of an offer of compensation for land to be taken therefor. I believe it is safe to assert that it has never been held, in the absence of statutes so providing, that there is any necessity for a minor being so represented in such a proceeding in order to make the decision of the acting administrative body valid. The notice to this minor of the proceeding before the commissioners was given as the county road law provides; and since the statute requires nothing more looking to the acquiring of jurisdiction by the county commissioners, and since that proceeding does not take her property without just compensation, I am of the opinion that there was no want of jurisdiction in the commissioners to render a final determination upon the questions the law commits to them as preliminary to the institution of eminent domain proceedings.

Our decision in *Chehalis County v. Ellingson,* 21 Wash. 638, 59 Pac. 485, I think, is easily distinguishable from the present case. In that case, there was a want of notice, as the road law requires, to one of the owners of the property, to wit, the wife. In this case, there is no want of notice of the preliminary proceedings. It was given in the manner the road statute provides. Even in a judicial proceeding a minor is served with process as any other defendant, before the question of his representation by a guardian arises. This is not a question of notice to a minor, but a question of the duty of the commissioners to see that this minor is represented before them by a guardian. Suppose the statute had provided for notice to owners and the public by publication, and the commissioners had complied therewith. This would have been but the adoption of a very common method of giving notice preliminary to action by an administrative body. Yet

the logic of the foregoing opinion, it seems to me, is that, even in such case, a minor owner of property that might ultimately be taken by eminent domain proceedings would have to be represented before the county commissioners by a guardian before they could act upon the matter. I cannot believe that such is the law, or that such was the legislative intent in the enactment of this statute.

It is argued that, by this view of the law, a minor owner is in effect deprived of his opportunity to be heard upon the question of the location of the proposed road. The same argument might be made as to the preliminary proceeding looking to the making of a local improvement when the question of the making of the improvement is decided by the city authorities upon a published notice, as has for years been a common method of procedure. Yet I never heard it suggested that it was necessary to have a minor owner of property represented by a guardian before the city authorities on the question of the making of the improvement. Other proceedings before administrative bodies could be instanced.

It is also argued that such minor owner loses the benefit of any offer of compensation which the county commissioners may make looking to the avoiding of eminent domain proceedings. If such minor owner does lose such opportunity, it is only because the situation is such that an offer cannot be accepted by him; but that is not the taking from him of any right guaranteed him by any constitutional provision. His property is not taken, nor can it be taken, except by eminent domain proceedings properly brought against him by service of summons as in an ordinary civil action and his representation therein by a proper guardian.

This minor owner has been given every *right and opportunity which the statute gives her,* in the absence

of which she would have no right to be heard at all upon the question of the location of the road. As to the estimate and offer of award to be made by the county authorities, that, as I view it, is for the benefit of the county rather than the owner, to the end that the county may avoid the expense of an eminent domain proceeding, all of which expense it has to bear, even the expense of the defendant owners' costs in that proceeding.

I am of the opinion that the superior court should be affirmed.

MOUNT and MAIN, JJ., concur with PARKER, J.

[No. 14837. Department Two. May 10, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Nick Constanti, Plaintiff*, v. LESTER H. DARWIN, *as State Fish Commissioner, Respondent.*[1]

FISH—LICENSE—RIGHTS OF ALIENS—STATUTES AND PROCLAMATIONS—WAR. The fact that the country is at war with Austria-Hungary does not impel the suspension of Rem. Code, § 5150-43, entitling actual residents of the state who have declared their intention to become citizens of the United States to a fishing license; since the President's proclamation of war between the United States and Austria-Hungary, of December 11, 1917, merely prohibits subjects of that country from entering or leaving the country, and declares that, so long as they conduct themselves according to law, they shall be undisturbed in the pursuit of their occupations, as friendly aliens on a different footing from the subjects of Germany.

SAME. The fact that such subjects are not now entitled to become citizens of the United States on account of the war, under U. S. Comp. St. 1916, § 4362, is immaterial; since it cannot be said that the intention of Rem. Code, § 5150-43, was to confine the right to those entitled to become citizens at the time they apply for a license to fish.

WAR—ALIEN ENEMIES. Alien enemies who by the President's proclamation of war are recognized as friendly aliens and accorded

[1]Reported in 173 Pac. 29.

security in the undisturbed peaceful pursuit of their lives and occupations and the consideration of all law abiding citizens, are authorized to maintain actions in our courts to secure their lawful occupations.

MACKINTOSH, J., dissents.

Application filed in the supreme court May 2, 1918, for a writ of mandate to compel the state fish commissioner to issue to the relator a purse seine fishing license. Granted.

Clinton W. Howard, for relator.

The Attorney General and *Glenn J. Fairbrook, Assistant,* for respondent.

MOUNT, J.—This is an application for a writ of mandate to require the fish commissioner of this state to issue to the relator a purse seine fishing license for the Puget Sound district for the current year.

The facts are conceded as follows: The relator is a native of Austria-Hungary. He came to the United States in May, 1913, and since June of that year has been an actual resident of this state. On the 29th day of December, 1913, he regularly, and in the manner required by law, declared his intention to become a citizen of the United States. Since the year 1914, and during the years 1915, 1916 and 1917, his regular occupation has been that of a salt-water fisherman, working on fishing appliances in the Puget Sound district under fishing licenses issued by the respondent. He owns property in the city of Tacoma, is a married man, forty-five years of age, having four children, two of whom were born in Austria-Hungary, and the two youngest were born in this state.

On April 15, 1918, upon application therefor to the United States food administration, a fisherman's license was issued to the relator by that administration,

authorizing the relator to engage in the business of catching and distributing salt-water fish.

On the 29th day of April, 1918, the relator applied to the respondent, who is the duly qualified and acting fish commissioner of this state, for a purse seine fishing license for the district of Puget Sound, and tendered the amount required by law to be paid therefor. The application was denied for the reason that the applicant was not a naturalized citizen of the United States, but a citizen of Austria-Hungary, with which country the United States is at war.

This application is resisted by the *Attorney General*, upon behalf of the respondent, upon the grounds that the relator is an alien enemy and, therefore, is not entitled to maintain this proceeding, and, under the law, is not entitled to the license from this state. The statute of this state, Rem. Code, § 5150-43, provides that:

"No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not a citizen of the United States of the age of eighteen years or over, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state for one year immediately preceding the application for such license. . . ."

It is plain, under this provision of the statute, that the relator, being an actual resident of the state for more than one year prior to the application, and having declared his intention to become a citizen of the United States, is entitled to the license he seeks, unless the fact that this country is at war with Austria-Hungary impels the suspension of the statute in so far as applicants are not citizens of the United States. On December 7, 1917, the Congress of the United States passed a resolution that a state of war is declared to

exist between the United States of America and the Imperial and Royal Austro-Hungarian Government. Thereafter, on December 11, 1917, the President, in pursuance of that resolution, and in pursuance of §§ 4067, 4068, 4069 and 4070, of the Revised Statutes of the United States relative to natives, citizens, denizens, or subjects of a hostile nation or government, issued a proclamation as follows:

"Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby proclaim to all whom it may concern, that a state of war exists between the United States and the Imperial and Royal Austro-Hungarian Government;

"And, acting under and by virtue of the authority vested in me by the constitution of the United States and the aforesaid sections of the revised statutes, I do hereby further proclaim and direct that the conduct to be observed on the part of the United States towards all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, shall be as follows:

"All natives, citizens, denizens, or subjects of Austria-Hungary, being males of fourteen years and upwards, who shall be within the United States and not actually naturalized, are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the states and territories thereof, and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their

own protection and for the safety of the United States; and towards such of said persons as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

"And all natives, citizens, denizens or subjects of Austria-Hungary, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, who fail to conduct themselves as so enjoined, in addition to all other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections four thousand and sixty-nine and four thousand and seventy of the Revised Statutes, and as prescribed in regulations duly promulgated by the President;

"And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety:

"(1) No native, citizen, denizen or subject of Austria-Hungary, being a male of the age of fourteen years and upwards and not actually naturalized, shall depart from the United States until he shall have received such permit as the President shall prescribe, or except under order of a court, judge, or justice, under sections 4069 and 4070 of the Revised Statutes;

"(2) No such person shall land in or enter the United States, except under such restrictions and at such places as the President may prescribe;

"(3) Every such person of whom there may be reasonable cause to believe that he is aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate any regulation duly promulgated by the President, or any criminal law of the United States, or of the states or territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confine-

ment in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President.

"This proclamation and the regulations herein contained shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States."

On the next day after this proclamation was issued, the Attorney General of the United States, referring to it, said:

"This proclamation differs from the preceding proclamation relating to the subjects of the German Empire in that, while it authorizes the arrest and internment of any subjects of the dual empire whose conduct may be a menace to the safety of the country, the only restrictions which it contains are prohibitions against either entering or leaving the United States without first obtaining permission.

"Many subjects of Austria-Hungary have already demonstrated their strong loyalty to this country by their faithfulness in industrial work, their organization of recruiting committees, and in service with our armies. For the present, therefore, no restrictions will be placed upon the movements of subjects of Austria-Hungary. They are not subject to the restrictions of the previous proclamations relating to German enemy aliens; they will be permitted to reside and labor in prohibited areas and to travel freely without molestation. Only those who are dangerous or disloyal are subject to arrest."

It seems plain, under this proclamation, that, though the relator may be an alien enemy because he has not been naturalized, yet there is nothing in this proclamation which treats a native of Austria-Hungary as an alien dangerous to the peace and safety of the country. The proclamation declares, with reference to such persons, that

"so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peace-

ful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, . . ."

and that

"all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

So it is apparent that this proclamation recognizes such persons as friendly aliens, and not as alien enemies. That the legislature may prohibit any but citizens of this state and of the United States from receiving a fishing license within the state admits of no doubt. It has not done so. That the Federal government may establish the status of a subject of an enemy country residing within the United States also admits of no doubt. It has done so by authorizing the proclamation above quoted. That the Federal government, or the President of the United States under authority of Congress, may nullify the statute with reference to permitting privileges to aliens who have declared their intention to become citizens of the United States admits of no doubt. In our opinion, this has not been done. But before the terms of the statute may be nullified or suspended by Congress, or by the President acting under authority of Congress, the intention to do so must be clear. We think such intention is not clear. On the other hand, it seems entirely clear that the proclamation of the President relating to natives of Austria-Hungary, quoted above, intended to preserve the rights of such persons in this country to follow their peaceful pursuits and occupations and to accord them the consideration due to all peaceful and law-abiding persons under the law of their domicile. As confirming this position, the food administration, acting under authority of Congress, has issued to this

relator, knowing his nationality and his status, a license "to engage in the business of catching and distributing salt water fish, shellfish and crustaceans."

The respondent argues that it was the intention of the legislature, in enacting Rem. Code, § 5150-43, above quoted, to confine the right of fishing in this state to citizens, or to those entitled to become citizens; and that, since § 4362 of the Compiled Statutes of the United States of 1916 provides that,

"No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States is at war, at the time of his application, shall be then admitted to become a citizen of the United States,"

the relator is not entitled to become a citizen of the United States, and for that reason the respondent was justified in refusing to issue the license. It is true, relator is not *now* entitled to be admitted to citizenship. He declared his intention to become a citizen in December, 1913. The time of residence does not expire until December, 1918. He will then have two years in which to make his final proof and become a naturalized citizen. So it is apparent that the relator may not at this time become a citizen. In due time, he may, or he may not, as future events develop. We think this point is entirely immaterial, because the statute says a person who has declared his intention to become a citizen and has been a resident of the state for one year immediately preceding his application shall be entitled to such license. The legislature meant what it said in that respect. It made no exceptions, and, since the statute has not been suspended or nullified by higher authority, it is still in force and must be followed.

We think it clear that the relator is entitled to prosecute this action for the writ. If such persons shall be

undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due all peaceful and law-abiding persons, we think it follows that they are authorized to maintain actions to secure to themselves their lawful occupations. *Fritz Schultz, Jr., Co. v. Raimes & Co.*, 99 Misc. Rep. 626, 164 N. Y. Supp. 454; *Id.*, 100 Misc. Rep. 697, 166 N. Y. Supp. 567; *Speidel v. Barstow Co.*, 243 Fed. 621; *Porter v. Freudenberg*, 1 K. B. 857, Ann. Cas. 1917C 215.

We are of the opinion, therefore, that the relator is entitled to the license and is authorized to maintain the action.

The writ will therefore issue as prayed for.

ELLIS, C. J., FULLERTON, and PARKER, JJ., concur.

MACKINTOSH, J. (dissenting)—The relator being a subject of a country with which we are at war, cannot resort to our courts. As I read it, the President's proclamation does no more than preserve to the subjects of Austria-Hungary the privilege of peaceful life and work in this country, and does not attempt to abrogate the rule of law which closes our courts to them during war time. I therefore dissent.

[Nos. 14243, 12186. *En Banc.* May 11, 1918.]

E. M. GORDON *et al., Respondents,* v. C. D. HILLMAN *et al., Appellants.*

THE STATE OF WASHINGTON, *on the Relation of E. M. Gordon et al., Plaintiff,* v. EVERETT SMITH, *Judge etc., Respondent.*[1]

COURTS—SUPREME COURTS—TERMS. Under Const., art. 4, § 2, providing that the supreme court shall always be open, there are no terms of court, and the close and termination of a session, provided for by Rem. Code, § 4, does not preclude the court from entertaining an application to recall a remittitur and vacate a judgment entered at such term.

APPEAL—DECISION—RECALL OF REMITTITUR. It is within the inherent power of the supreme court, under its appellate and revisory jurisdiction, to recall a remittitur and vacate its judgments in a proper case.

ABATEMENT AND REVIVAL—DEATH PENDING APPEAL. Under Rem. Code, § 193, which abrogates the common law and provides that no action shall abate by the death of a party if the cause survives, and Id., § 1743, providing for substitutions in case of the death of a party after final judgment from which appeal has been taken, the supreme court having acquired jurisdiction of a party before death, and having jurisdiction of the subject-matter of a trial *de novo* on appeal, there is no abatement of the cause of action by a death which was not brought to the attention of the court; and the judgment and proceedings are not void or voidable, but only erroneous.

APPEAL—REVIEW—RECALL OF REMITTITUR—DILIGENCE. Petitions to recall two remittiturs and vacate judgments in two cases, because of the death of a party coming to the knowledge of the petitioners only after the first judgment was entered, will be denied for want of diligence, where petitioners had notice of the death at the time the decree was presented to the court below after remittitur went down in the lower court, and failed to then petition for relief, or to suggest a substitution upon a hearing of the subsequent case.

STIPULATIONS—WRITING. Stipulations not made in writing or in the record of the court cannot be considered.

APPEAL — DECISION — RECALL OF REMITTITUR — GROUNDS — RELIEF FROM ERRONEOUS JUDGMENT. In an action for rescission of a trade

[1]Reported in 173 Pac. 22.

of real estate and personal property, in which judgment for restoration was affirmed after the death of a party pending appeal without substitution having been made, a recall of remittiturs and vacation of the judgment is not warranted by the fact that reconveyance cannot be made as to minor heirs of the deceased party, nor by the fact that one of the parties wasted and permitted loss to the properties to be restored; but the supreme court will grant permission to sue for the losses sustained by the failure of title through the death and failure to suggest the same, and waste and loss of the properties.

Petitions to recall remittiturs and for leave to vacate a judgment, filed in the supreme court April 26, 1918. Denied.

Wilson R. Gay and *Geo. H. Rummens,* for appellants.

Byers & Byers, for respondents.

HOLCOMB, J.—We have here before us two concurrent petitions by the petitioners to recall remittiturs heretofore issued from this court, and also for leave to vacate judgment upon facts alleged in one of the petitions under the practice first authorized by this court in *Post v. Spokane,* 28 Wash. 701, 69 Pac. 371, 1104. The cause was originally before us on appeal by the petitioners, who were defendants in the case of *Gordon v. Hillman,* 91 Wash. 490, 158 Pac. 96, an equitable action for rescission of contracts of sale of real and personal property, where a judgment and decree of the lower court was affirmed. It subsequently came before us upon an application filed here for writ of mandamus to compel the judge of the court below to sign a decree in the case of *State ex rel. Gordon v. Smith,* 98 Wash. 100, 167 Pac. 91, 169 Pac. 468.

In one or both of the petitions now before us, one of the grounds relied upon for the relief is that, pending the appeal to this court in the original cause, Mrs. Gordon, one of the plaintiffs and a necessary party in that

action, died. The original judgment was entered in the court below February 28, 1914, and it is shown now that, on August 22, 1914, Eva P. Gordon, one of the plaintiffs and wife of E. M. Gordon, died, and E. M. Gordon was, on September 17, 1914, appointed and qualified as administrator of the estate of Eva P. Gordon, and that never at any time, or at any stage of the proceedings on appeal, was the administrator or any other person substituted as a party respondent in that cause in lieu of or as a representative of Eva P. Gordon, deceased. It is asserted that all proceedings and all opinions by the court rendered and all judgments made and rendered therein were had and done at a time subsequent to the death of Eva P. Gordon and while there was no person substituted in her place and stead, and for that reason the whole proceedings in this court subsequent to the death of Eva P. Gordon were and are void, and for that reason must be vacated and set aside and all remittiturs recalled and all judgments of the superior court based thereon vacated. It is also alleged that Eva P. Gordon left her surviving two minor children, and that all the real estate of which she died possessed vested immediately, as to her one-half interest therein, in the two minor sons, Donald P. Gordon and Douglas D. Gordon, who each owned an undivided one-fourth interest in and to the real estate and an undivided one-eighth interest in and to the personal property, which includes the money judgment entered in the original cause.

Respondents have appeared and demurred and also answered to the petitions, and as grounds of demurrer urged that this court had no jurisdiction over the respondents by the petition. One of the propositions urged under the demurrer is that all proceedings in both cases referred to herein were terminated and remittitur filed below prior to the commencement of the

present term of court, and that this court has no jurisdiction after the close of the term at which the decisions were handed down.

There is no merit in this contention. The constitution creating this court, art. 4, § 2, provides that it shall always be open for the transaction of business except on nonjudicial days. The statute, Rem. Code, § 4, follows the same provision, but provides also that regular sessions shall commence on the second Mondays of January, May, and October of each year. Under the constitutional provision there are no terms of this court in the sense in which they were formerly held, but only a division of sittings in the sessions for its convenience in the transaction of business. *Skagit R. & Lum. Co. v. Cole,* 1 Wash. 330, 26 Pac. 535. Terms of court, as they are provided for in many jurisdictions where a court of record acquires and maintains, after which it cannot, except for a limited extended period, retain jurisdiction, do not exist in this state.

As to the power of the court to grant such relief in exceptional cases, that was settled in *Post v. Spokane, supra,* and followed in several subsequent cases. It is proper where the petition states facts sufficient to justify the relief demanded, and the permission of the court to take further action in the matter that has been litigated in the trial courts and by appeal to this court is not original jurisdiction, but is one of the powers of this court under its appellate and revisory jurisdiction. It is an inherent power of a court of equity, whether original or appellate.

Petitioners rely upon the provisions of Rem. Code, §§ 967, 193, and 1743. Section 1743 provides as follows:

"The death of a party after rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal; but the

proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court, and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof."

Section 193 provides:

"No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

At common law all actions pending abated upon the death of a necessary party. But § 193, *supra,* abrogated this provision of the common law, and provided that no action should abate by the death of the party if the cause of action survived or continued; and there is no doubt that such a cause of action as was here originally involved was one which survived or continued. But that cause of action had then been merged in a judgment in favor of plaintiffs, and the plaintiffs had a judgment which was final, subject only to appeal, and in such action this court was required to try the cause *de novo* upon the record. Having merged into judgment, the cause of action could not abate upon the death of either of the plaintiffs. After the judgment, the provisions of § 1743, *supra,* related to the abatement of the right to appeal or of an appeal taken; and it was there enacted that the death of a party after judgment should not affect any appeal taken or the

right to take an appeal, but the proper representatives in personalty or realty of the deceased could come in voluntarily as parties to the cause; or, if they failed to do so, the adverse party might cause them to be substituted pending the appeal.

Although Mrs. Gordon died at about the time that the appeal from the original judgment in her favor was perfected by these petitioners, nevertheless they had secured jurisdiction of her on appeal, and this court had acquired jurisdiction of her and of the subject-matter of the appeal and the matter in controversy between them, and no suggestion was made in this court by either the appellants (petitioners here) or the respondents of the death of Mrs. Gordon until after this court had rendered a final decision and the remittitur thereon had gone down to the court below. Under the statute, the appellants in that case, having the privilege of suggesting the death of one of the necessary parties and bringing about a substitution of parties, failed to do so. While the petition does not so aver, it was stated and urged in the oral argument on these matters by the counsel for petitioners that counsel did not know of the death of Mrs. Gordon until about the time that the remittitur went down in the original cause and some matter was being presented in connection with the decree in the court below, and it is shown that petitioners themselves were during all the time in California. The first suggestion we can find in the record of the death of Mrs. Gordon is in the decree which was presented by respondents in the original cause for entry in the court below on May 3, 1917, where it was then mentioned that E. M. Gordon was the administrator of the estate of Eva P. Gordon, deceased. Upon a hearing of the application for the writ of mandamus before this court in cause No. 14243, respondents in that matter, appellants in the original

cause and petitioners here, suggested the fact of the death of Mrs. Gordon to this court and that no substitution had been made, but no action was then taken by either of the parties to the original cause for a substitution of parties. This court, by its departmental decision, *State ex rel. Gordon v. Smith,* 98 Wash. 100, 167 Pac. 91, noticed the death of Mrs. Gordon, and in the opinion said:

"The death of one of plaintiffs prevents a reconveyance by the plaintiffs as individuals, but the deed of the commissioner will convey all of the title of the surviving plaintiff as well as all of the title vested in the estate of the deceased plaintiff. It can be made with the special warranties required by the judgment, obligatory upon the surviving plaintiff and upon the estate of the deceased plaintiff, and to these special warranties the defendants must look for any relief, if to any they are entitled," etc.

While this departmental decision became final as the decision and judgment of this court, it is manifest that it was erroneous in that part which held that a commissioner appointed by the court could divest the title of the deceased plaintiff as well as that of the surviving plaintiff in community real estate which had vested, not in the administrator and not in the surviving plaintiff or member of the community, but in the minor heirs of the deceased. There should at that time have been some motion on the part of one or the other of the parties hereto to cause a substitution of the "proper representatives in personalty and realty of the deceased;" and, as has been said, it was as much the duty of the one party as the other, having knowledge of the facts. It is probable that petitioners' first knowledge of the fact of the death of Mrs. Gordon was at the time of presentation of the decree, which the court below refused to sign as presented and which was brought here

by the application for the writ in No. 14243. Then the representative of the respondents there (petitioners here) urged the fact upon this court and the suggestion was ignored.

Most of the argument of counsel for petitioners as to the abatement of the cause of action or the appeal, and most of the authorities they cite, involve only causes of action which have not yet been reduced to judgment.

"As a general rule the death of a party pending an appeal or writ of error furnishes no ground for the abatement of the action." 1 Cyc. 79.

"Where judgment below has been rendered in favor of plaintiff, and he dies pending an appeal or writ of error prosecuted by defendant, there is no abatement of the appellate proceedings. But where the judgment below is for defendant, and he dies pending an appeal or writ of error prosecuted by plaintiff, the appellate proceedings will abate." 2 Cyc. 772.

"Where the sole defendant is dead when suit or writ of error is brought, it may be true that a judgment against the deceased defendant is a nullity, for the reason that the court never acquired jurisdiction of the cause. In such case the court never acquired authority to act or take any step. But that is not the case here. Here, the court, before taking any steps, was clothed, by the acts of the parties and the law, with full jurisdiction and rightful authority to render the judgment that it did. Did the death of the appellee—not brought to the notice of the court by plea, suggestion, or otherwise—deprive it of jurisdiction lawfully acquired? We think not." *Danforth v. Danforth,* 111 Ill. 236.

See, also, *Phelan v. Tyler,* 64 Cal. 80, 28 Pac. 114; Black, Judgments, § 306.

We therefore conclude that there was no abatement of the cause of action on the death of Mrs. Gordon, nor of the appeal taken by the parties against whom she had judgment, jurisdiction of which had been acquired by this court prior to her death, and that the further

proceedings in this court thereafter were not void nor voidable, and were not even erroneous.

Nor can we recall the remittiturs in the two proceedings involved.

"This court lost jurisdiction of the cause when the remittitur went down. For the purpose of correcting a mistake, or enforcing its judgment, this court may recall a remittitur, if application therefor is made with due diligence. . . . There is no contention that any mistake was made in the original opinion, nor has application for a recall of the remittitur been made with due diligence." *Peabody v. Edmonds,* 72 Wash. 604, 131 Pac. 250; *Willson v. Willson,* 86 Wash. 50, 149 Pac. 328; *State ex rel. Burke v. Board of County Com'rs,* 61 Wash. 684, 112 Pac. 929.

Petitioners had notice of the death of Mrs. Gordon at the time the decree was presented to the court below after the remittitur went down in the original cause; knew that Mrs. Gordon was the wife of E. M. Gordon, that the estate was community estate, and that it vested immediately upon her death in her heirs. That was in May, 1917. That was the time for them to petition, as they have now petitioned, for relief against the proceedings in the original cause on account of the intervention of interests of others than those of the original parties.

However, there are grounds of relief urged in the petitions other than those we have noticed. Among other things, it is urged that, by reason of the death of Mrs. Gordon, reconveyance cannot be made of her interests in the real estate which had been conveyed by petitioners to them, since title vested in her heirs, and that they have not conveyed, and are minors and cannot convey. As was stated before, this was noticed in the decision in *State ex rel. Gordon v. Smith,* 98 Wash. 100, 167 Pac. 91, 169 Pac. 468, but it is not there noticed that the real estate of Mrs. Gordon vested in

two minor heirs, and it was assumed that the commissioner appointed by the court could convey all the title vested in the estate of the deceased plaintiff. This the court is manifestly without power to grant, since the estate of the deceased plaintiff was vested in her heirs and those heirs were minors and had never been before this court or the court below in the matter in controversy. It is answered by respondents here, however, that, prior to the institution of the original action, the Gordons had tendered into court deeds to the real property for the use and benefit of these petitioners, and that the deeds remained in the registry of the court subject to the disposition and control of the petitioners, and that they were finally accepted by the petitioners. Apparently we did not so find the record when determining the application in cause No. 14243.

What the lower court, in the original cause, attempted to do in the controversy was to restore the *status quo* of the parties as to property concerning which they had negotiated, and to preserve certain equities in favor of all the parties. In doing so, the decree provided that plaintiff should restore certain properties to defendants and that defendants should restore certain properties to plaintiffs. In the petitions now before us it appears that, while the petitioners, who were defendants in the original cause, prudently and carefully preserved all the property which had passed to them from the plaintiffs, paid taxes thereon, paid interest on mortgage debts, and allowed no interest to be lost or destroyed; on the other hand, plaintiffs, while the action was pending below and in this court, allowed great losses in the property which had been conveyed to them, both real and personal, allowed taxes to accrue, although they had money in their hands with which to pay them, allowed interest on notes to default, allowed notes to become overdue,

and failed to collect them or make any attempt to collect them, and in divers respects caused and permitted great loss and damage to the properties which had been transferred and conveyed to them, and upon the termination of the litigation turned back properties to these defendants under the decree in an almost worthless condition by reason of the dissipation, waste and loss thereof; that, on the other hand, the defendants paid out large sums in preserving the property held by them, for which they could obtain no relief because it was not a subject of controversy in the original action; and that the loss and damage which was accruing through the acts and omissions of respondents while the litigation was pending in the original controversy could not be considered because not a matter of original controversy therein; that, by reason thereof, they are entitled to relief under the principle announced in *Post v. Spokane, supra.*

As to these averments, respondents answered with denials and also affirmative allegations, to the effect (1) that there was a stipulation agreed to by the petitioners in open court that the judgment in the original cause as entered should be final and there should be no further litigation; that a consideration for that stipulation was paid and accepted, in that petitioners gave a promissory note in the sum of $10,000 secured by mortgage, the payments of which when made were to be made on the judgment, thereby acquiescing in and confirming the finality of the judgment; (2) that petitioners accepted the deeds, notes and transfers tendered to them at the initiation of the action in 1912, at the time of the signing of the final judgment on January 5, 1918, and retained the same; (3) that petitioners had acknowledged their liability as defendants in an action to foreclose a mortgage on the principal piece of property, known as the Pike Place property, which

they have at all times retained since the initiation of the action and now retain, and for which the alternative judgment was mostly awarded.

As to the stipulation alleged to have been made in open court on January 5, 1918, it not having been made in writing or made of record in the court, cannot be considered here. As to the acquiescence by giving the promissory note and mortgage for $10,000 to be applied upon the judgment, it is shown by a contract made at the time the notes are shown to have been made as collateral thereto, set out in one of the petitions here, that "Gordon in accepting that note and mortgage is not accepting them as security for the payment of the judgment entered in the state of Washington or any part or portion thereof; that the application of said judgment is not affected in any way by the execution and delivery of said note and mortgage or by the execution of this agreement. Dated March 19, 1918."

As to the retention of the principal part of the property in litigation by the respondents, we have no knowledge. We must presume, however, that the decree heretofore entered and affirmed and thereafter ordered to be carried into execution by a further judgment of this court has been obeyed. If not, there are very effective remedies therefor.

In conclusion, we are convinced that we have no jurisdiction to recall the remittiturs, or to stay the proceedings until petitioners can litigate their claims against the Gordons for their losses on account of waste and dissipation of the property while held by the Gordons prior to the final decree in the cause, for the reasons heretofore stated.

The showing made by petitioners is such, however, that we believe the ends of justice demand that an opportunity shall be given to petitioners to litigate in

some appropriate manner the losses and damages alleged to have been sustained by them.

Permission is hereby granted, therefore, for petitioners to proceed, if they be so advised, in any form of action at law or in equity for relief in damages or otherwise, for such losses as they have sustained in regard to the property transferred and conveyed to the Gordons involved in their controversy, and the failure of title, if any, by reason of the death of plaintiff Mrs. Gordon and the intervention of the rights of her minor heirs. This is all the relief which under the law we are authorized to grant.

MOUNT, PARKER, WEBSTER, and MACKINTOSH, JJ., concur.

[No. 13791. *En Banc.* May 11, 1918.]

J. MATZGER, *Respondent,* v. ARCADE BUILDING & REALTY COMPANY, *Appellant.*[1]

ESTOPPEL—BY RECORD—JUDGMENT AND FAILURE TO APPEAL. Judgment unappealed from in a contempt proceeding to enforce an injunction, in which the court had jurisdiction to assess plaintiff's damages, dismissing the proceeding without prejudice to plaintiff's right to maintain an action for damages, estops the defendant from asserting that plaintiff elected his remedy in bringing an action for an injunction and so could not sue for damages.

LANDLORD AND TENANT — INTERRUPTION OF QUIET ENJOYMENT — MEASURE OF DAMAGES. The measure of damages for an interruption of quiet enjoyment by interference with light is the difference between the value of the property as furnished and the rent reserved, or the diminished value of the use of the property; loss of profits being usually regarded as too remote and speculative, unless proof of profits is so clear that they were, as a matter of law, within the contemplation of the parties.

SAME. The evidence of loss of property is not sufficient to bring a case within the exception to such rule, where the tenant's business was not interrupted, he complained only that facilities for carrying

[1]Reported in 173 Pac. 47.

it on were not so good as before, and there was nothing to show how much of the lost profits was due to the use of artificial lights, how much to plaintiff's partner being in a rival business, or how much to personal elements in the management of plaintiff's business and the sale of his goods.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 5, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Reversed.

Peters & Powell and *Beebe & Whitcomb,* for appellant.

Vanderveer & Cummings and *Harry Sigmond,* for respondent.

CHADWICK, J.—This is an action to recover damages which the plaintiff, Matzger, claims to have suffered as the result of the acts of the defendant, Arcade Building & Realty Company, in the interference with the access of light and ventilation to the storeroom occupied by him as a tenant of that company. The plaintiff seeks to have the damages so suffered by him measured by the loss of profits and injury to goods in his business during the period of the defendant's alleged interference with the enjoyment of light and ventilation which he was entitled to as its tenant. The trial in the superior court sitting with a jury resulted in verdict and judgment against the defendant, awarding the plaintiff $7,000 damages, from which the defendant has appealed to this court.

For many years past, appellant has been the owner of the Arcade building and the Arcade Annex building, in Seattle. These buildings are upon the block bounded on the north by Union street, on the east by Second avenue, on the south by University street, and on the west by First avenue. The buildings occupy the whole of the block, excepting an alley thirty-five

feet wide, running north and south through the middle of the block. Appellant owns the whole of the block, including the alley. For many years prior to the month of February, 1913, respondent was engaged in the ladies suit and cloak business in Seattle. Early in the year 1909, he became the tenant of appellant, occupying one of its storerooms in the Arcade building fronting on Second avenue and extending back to the alley between the two buildings. This tenancy was under a lease and continued until December 31, 1913, when the lease expired. It is alleged that, prior to the acts of appellant now complained of, the rear of respondent's storeroom was well adapted to facilitate the fitting, altering and pressing of ladies suits and cloaks. This, because of the well-lighted condition of the rear of the store, which condition resulted from the fact that there was no building or other structure near enough to the rear windows of the store to obstruct the natural light. The fitting, altering and pressing of suits and cloaks was an important part of respondent's business, as most suits require considerable attention and work of this nature when sold to customers. Respondent contends that to do this work requires good natural light, otherwise mistakes would necessarily occur, resulting in inferior service to customers and consequent dissatisfaction on their part, and also in damage to goods, rendering them less salable.

In February, 1913, appellant commenced the construction of a covered bridge over a considerable portion of the alley, with a view of connecting the upper floors of the two buildings, which construction threatened to seriously interfere with the access of light and air to the rear of respondent's store. Thereafter respondent commenced an action in the superior court for King county seeking to enjoin the construction of the bridge because of its threatened interference with

the access of light and air to his store. That action resulted in a judgment against appellant, rendered April 23, 1913, enjoining it from erecting or placing within the alley any structure which would interfere with the free access of natural light and ventilation to respondent's storeroom as such natural light and ventilation had existed at and prior to the commencement of that action. That judgment was thereafter appealed from by appellant and affirmed by this court. *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A 288. Thereafter appellant made some changes in its plans for the construction of the bridge over the alley, claiming such change would not interfere with respondent's light and ventilation as adjudicated in the injunction suit, and proceeded with the construction of the bridge in accordance with such changed plans. Thereafter respondent, conceiving that appellant was proceeding in violation of the injunction, commenced a contempt proceeding against it and its officers seeking to have them punished for violating the injunction and to coerce obedience thereto. On July 3, 1913, the contempt proceeding was dismissed. The order of the court is as follows:

"The above entitled matter coming on June 27, 1913, for hearing upon the application of the plaintiff to have the defendant adjudged in contempt for violating the decree heretofore entered in said cause; and said matter is submitted to the court upon the record, affidavits and argument of counsel, and by the court taken under advisement; and thereafter, to wit, on the first day of July, 1913, the court being advised in the premises;

"It is by the court ordered that said application be and the same is hereby denied, to which order said plaintiff excepts, the denial of said application being without prejudice to any claim or right for damages which said plaintiff may have against the defendant on

account of the putting up of the structure mentioned in said application."

Respondent continued to occupy the storeroom under his tenancy until December 31, 1913, when his lease expired, and thereafter commenced this action to recover damages.

It is first contended by counsel for appellant that it is entitled to judgment in its favor as a matter of law, motions having been timely made in that behalf in the trial court, upon the ground that respondent having elected to seek relief by injunction, he should not now be permitted to seek damages in an action at law. Counsel argues that the commencement of the injunction action was an irrevocable election of a remedy on the part of the respondent. Rem. Code, § 1058 is invoked.

"The court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit, or proceeding by the aggrieved party for such loss or injury."

State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426, 107 Pac. 196, is relied on. But whether we regard the statute as mandatory or otherwise, we think appellant is estopped by the record to raise this question. The court held in the contempt proceeding that its judgment of dismissal was without prejudice to the right of respondent to maintain an action for damages. This judgment was not appealed from, and the court, having jurisdiction to assess the damages, having entered a judgment without prejudice to another proceeding, appellant is estopped to raise the question in a collateral proceeding.

It is contended in appellant's behalf that loss of profits is not a proper measure of respondent's damages, and, therefore, the receiving of proof for that purpose was erroneous. The principal argument is that loss of profits could in no event be a lawful measure of damages resulting from interference with a leasehold interest in real property, but that the damages, if any were suffered, are to be measured by the lessening of the rental value of the premises.

It may be granted that, in certain cases, a tenant may show a loss of profits in the conduct of an established business where the landlord has unreasonably interfered with the full enjoyment and use of the demised premises. But cases so holding rest in an exception to a general rule, which has twice been declared by this court. *Kohne v. White,* 12 Wash. 199, 40 Pac. 794; *Purcell v. Warburton,* 70 Wash. 129, 126 Pac. 89. Interference with light is a breach of the covenant of quiet enjoyment. Taylor, Landlord and Tenant, 309 (a).

The measure of damages for an interruption of quiet enjoyment by the landlord is the difference between the value of the use of the property as furnished by the landlord and the rent reserved. In other words, it is the diminished value of the use of the property. Tiffany, Landlord and Tenant, § 79g; Underhill, Landlord and Tenant, § 432; Taylor, Landlord and Tenant, §§ 177 and 317; 16 R. C. L. 770.

Loss of profits are usually regarded as too contingent, remote or speculative to be considered. 16 R. C. L. 1056. The general rule should not be departed from unless it is impossible to measure the losses by it, or the character of the business is such and the proof of the profits so clear that the court can say, as a matter of law, that loss of profits was within the contemplation of the parties at the time the contract was made.

If this be so, it will declare lost profits to be the measure of damages.

In the case of *Purcell v. Warburton, supra,* it was contended that the landlord had not furnished heat as he had contracted to do, and because of his failure the tenant had been damaged. We referred to the case of *Kohne v. White, supra,* saying:

"The correct measure of damages is, therefore, the difference between the value of the use of the rooms as furnished by the plaintiff and heated as contemplated by the contract, and the value of their use as in fact heated by the defendants."

If the word "lighted" is substituted for the word "heated," we have an identical case.

But if it be held that the loss of usable value is not a proper measure of damages, the exception to the rule allowing a loss of profits should not be allowed in this case, for, in sound reason and under all authority, a loss of profits is not allowed unless they can be measured with a fair degree of accuracy. The testimony must be clear and free from taint of speculation or conjecture. The rule rests in a principle applied in all cases for damages arising out of a sale of property or the use of property.

To sustain a verdict for prospective profits, the jury must have some reasonable basis for estimating the worth of the business. From the nature of things, prospective profits cannot be proved to the dollar. Yet the law does demand that there shall be tangible evidence sufficiently clear and convincing to reasonably sustain a verdict. There must be some standard of comparison.

Respondent with another (his brother-in-law) had been in business for a term of years. Their books were not accurately kept. From time to time they had called in an expert accountant to measure the worth

of the firm. He would force an inventory of the business based upon the amount of purchases and sales, and from this would make up a statement.

Respondent dissolved partnership with his partner in July. No inventory was taken. The goods were divided one-half to each. In order to find the worth of the goods at the time of the dissolution for use in this suit, an accountant was employed. He took the former forced inventories and, by a purely theoretical process of reasoning, came to the conclusion that the value of the goods left in respondent's hands was about $5,-793.41, so that it will be seen that the amount of goods with which respondent continued the business was not accurately determined. The figures were arrived at by consulting so-called inventories, which in themselves were no more than a guess at value.

The books of the old business were continued as the books of respondent's business. The books were admitted, but they constitute, with the exception of a few months, the record of an entirely different business, operating under different conditions with possibly a larger stock of goods, and showing in no way, as we have said, the value of the stock of respondent at the time he began to do business on his own account.

Moreover, we may assume that, with the dissolution of the firm and an equal division of the goods, the retiring partner going across the street and setting up business for himself, would in itself, in greater or less degree, diminish the profits which respondent might otherwise legitimately receive. Then, again, the testimony shows that the retiring partner was what is called the "floor man" of the business. He it was who met and had personal acquaintance with the customers of the firm, while respondent was office man and buyer.

With these things made clear in the record, we cannot understand how the court can find that percentages

based on the former business, and arrived at theoretically, are evidence from which a jury can draw a verdict with a reasonable degree of accuracy.

An examination of the cases will show that, where profits have been allowed as the measure of damages, there has generally been an interruption to the business amounting to an eviction. As, for example, the failure of a landlord to furnish steam heat in a hotel operated by his lessee, thereby making it uninhabitable for guests and doing away entirely with the tenant's business, or where the tenant was unlawfully evicted from the premises, or the landlord has maintained such a nuisance as to preclude the carrying on of the tenant's business.

In the instant case, the tenant was not evicted; his business was not interrupted; his sole complaint is that the facilities for carrying on his business were not so good after the alteration was made by the landlord. His whole case rests on the damages which he claims resulted to him because some of his light and fresh air was shut off and he was compelled to use artificial light in place of natural light. He testifies that nearly all garments have to be altered, and that his workmen made mistakes working under the artificial light, so that customers would return the goods and a sale would be lost. How many garments were thus spoiled, and whether it was due to the light or to the inefficiency or carelessness of the workmen, is of course entirely problematical. As between employer and employee, respondent could say it was the workman's fault; and as between himself and the landlord, he could, with the same show of reason, blame it on the loss of light.

The same is probably true as regards his contention that sales were lost because the customer could not see the true color of the goods under the artificial light. There is no showing that the customer was prevented

from going to the front of the store and seeing the goods by daylight. As between himself and the salesman, if a sale were lost, the respondent could blame the salesman; and as against the "greedy landlord," as he calls the defendant, he could put the blame on the artificial lights.

Admitting, as respondent claims, that his business was damaged by the acts of the defendant, yet there is nothing in the record that would warrant a jury in determining how much of the lost profits was due to the use of artificial lights, how much to plaintiff's partner being in a rival business, and how much may have been due to personal elements in the management of plaintiff's business and the sale of his goods.

It is for the reasons appearing from every angle of this case that the law asserts the general rule that, for a breach of the covenants of a lease, the measure of damages is the difference between the value of the term and the rent reserved.

There is further evidence that the books did not evidence the true condition of the firm or of respondent's business. He admits that he had deposited something like $53,000 of his own money in the bank with the intent and for the purpose of creating a false standard of credit. His purpose being to so establish himself that he might have less difficulty in obtaining sufficient credit to eventually engage in the wholesale trade.

Reversed and remanded for a new trial.

ELLIS, C. J., HOLCOMB, MOUNT, FULLERTON, MAIN, WEBSTER, and PARKER, JJ., concur.

[No. 14039. *En Banc.* May 11, 1918.]

M. G. BENTLEY, *Respondent*, v. WESTERN UNION TELEGRAPH COMPANY, *Appellant*.[1]

TELEGRAPHS AND TELEPHONES — MISTAKE IN TRANSMISSION—DAMAGES—PROXIMATE CAUSE. Where, through the mistake of a telegraph company, apples shipped from Oregon to California were delivered to the consignee by the consignor's agent at $1.08 per box, instead of $1.80, in reliance upon an erroneous message, and the mistake of the telegraph company was the proximate cause of the consignor's loss, it was not the duty of the consignor to mitigate his damages by the acceptance of a prompt tentative offer by the consignee to settle for the apples at $1.50 per box; since that would have made a new contract and waived his claim against the telegraph company; and the measure of his damages is the difference between the price received by him on the completed sale at $1.08, and the fair market value of the apples (overruling on rehearing, Id., 98 Wash. 431; FULLERTON, MOUNT, and CHADWICK, JJ., dissenting).

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered July 17, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Gose & Crowe, for appellant.

Sharpstein, Smith & Sharpstein, for respondent.

ON REHEARING.

HOLCOMB, J.—A rehearing *En Banc* was granted in this case from the decision heretofore made and reported in 98 Wash. 431, 167 Pac. 1127.

The facts at issue and the legal propositions involved are sufficiently stated in the former prevailing opinion and the dissenting opinion therein, and no amplification is necessary now. For the reasons stated in the dissenting opinion, which the majority of the court now adopt as the correct view of the law and of

[1]Reported in 172 Pac. 1172.

the disposition of the case, the former opinion is overruled and the verdict and judgment affirmed.

ELLIS, C. J., WEBSTER, MAIN, and PARKER, JJ., concur.

FULLERTON, MOUNT, and CHADWICK, JJ., dissent.

[No. 14059. Department One. May 11, 1918.]

G. W. LARUE *et al.*, *Respondents*, v. FARMERS & MECHANICS BANK, *Appellant*.[1]

FRAUDS, STATUTE OF—SALE OF LANDS—MEMORANDUM—DESCRIPTION—SUFFICIENCY. The statute of frauds requiring a contract for a broker's commission to be in writing is not satisfied by a writing describing the "Hillcrest ranch below Pullman," of 907 acres "more fully described as parts of sections 17, 18, 19 and 20 in township 13, range 44."

Appeal from a judgment of the superior court for Spokane county, Girand, J., entered December 11, 1916, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Hurn & Hurn and *J. Webster Hancox*, for appellant.

McCroskey & Stotler and *John Pattison*, for respondents.

PER CURIAM.—Respondents brought this action to recover a commission on a sale of certain property belonging to the appellant. The contract is to be gathered from a letter by respondents to Mr. Orris Dorman, of the appellant bank:

"We are writing you in regard to the 907 acres located 14 miles southwest of Pullman, belonging to the bank. If this place is still on the market, we would be pleased to have you send us new description of it."

[1]Reported in 172 Pac. 1146.

A letter from Mr. Dorman:

"I am enclosing herewith description of the ranch below Pullman. The price at which we hold this is $32,000, subject to $1,000 commission. I hope that you will get busy and sell something for me at once."

The description is a typewritten unsigned paper reading as follows:

"Hillcrest Ranch.

"Property of Farmers & Mechanics Bank, Spokane, Washington.

"This ranch consists of 907 acres, of which there are about 500 tillable, most in cultivation, practically level and as good land as there is in the Palouse country, crop on about 250 acres, summer fallow.

"Pasture: The pasture lays in two fields of about equal amounts. One field sloping toward the Snake river has the advantage of climate making it a number one winter grazing proposition. The other slopes to the north into the Wai-Wai Canyon, and like all north slopes of the Palouse country is subject to more moisture and heavier growth of grass.

"Buildings: The house is one of seven rooms, plastered, practically new, and in fine condition. The barn will hold 40 head of horses and 100 tons of hay. Other buildings such as are required on a place of this character are in good condition.

"Orchard: There are about 2 acres in orchard with several varieties of fruit sufficient for the place and all the neighbors in the country.

"Location: Twelve miles southwest of Pullman and 7 miles from Johnson, a town on the N. P. Ry. south of Pullman. Lies in township 13, range 44, more fully described as parts of sections 17, 18, 19 and 20.

"Stock Possibilities: This place could easily maintain 125 to 150 head of horses and cattle, besides 200 to 300 head of hogs which ought, under proper management, pay 10 per cent on an investment of $50,000.

"Water: Water is pumped from a spring near the barns into a cistern on the hill, and from there is piped to the house and portions of the premises. Every field is supplied with an abundance of spring water."

The controlling question in the case is whether these writings are sufficient to satisfy the statute of frauds. It is our opinion that they are not, under the final holdings of this court upon this vexed question, and upon the authority of *Rogers v. Lippy,* 99 Wash. 312, 169 Pac. 858, and *Nance v. Valentine,* 99 Wash. 323, 169 Pac. 862, the judgment of the lower court is reversed, and the case will be remanded with instructions to enter a judgment of dismissal.

[No. 14211. Department One. May 11, 1918.]

PEOPLES SAVINGS BANK, *Appellant,* v. FIRST NATIONAL BANK *et al., Respondents.*[1]

CONTRACTS—VALIDITY—UNLAWFUL COMPETITION—WHO MAY QUESTION. A party cannot invoke the aid of the courts to restrain an unlawful interference with competition by the fixing of a three per cent rate for savings deposits in banks, where the effect thereof would be to give such party the advantage of its equally unlawful contract fixing a four per cent rate.

ASSOCIATIONS—DISSOLUTION. A voluntary clearing house association without agreement for any specified period of time, may be dissolved at any time at the will of the majority of its members.

BANKS AND BANKING—INJUNCTION—CLEARING HOUSE ASSOCIATION—DISSOLUTION—POWER OF COURTS. Since the violation of a contract will not be restrained where it cannot be specifically enforced, the courts will not restrain the dissolution of a voluntary clearing house association the duties of which were those of an agent and fiduciary representative of its members, involving the exercise of skilled knowledge and judgment which cannot be specifically enforced by the courts.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 1, 1916, dismissing an action for an injunction, tried to the court. Affirmed.

[1]Reported in 173 Pac. 52.

Piles & Halverstadt (*Clyde Merchant,* of counsel), for appellant.

Peters & Powell and *Donworth & Todd,* for respondents First National Bank *et al.*

Hartman & Hartman, for respondent Northwest Trust & Safe Deposit Company.

MAIN, J.—This action was brought for the purpose of restraining the dissolution of the Seattle Clearing House Association. At the institution of the action, a temporary restraining order was issued. The trial resulted in a judgment denying an injunction and dismissing the action. From this judgment, the plaintiff appeals.

The controlling facts may be stated as follows: The Seattle Clearing House is a voluntary association. The members thereof are sixteen banks in the city of Seattle. All the members of the association, including the appellant, were engaged in taking two kinds of deposits, known as commercial deposits and savings deposits, except that one bank did not take commercial deposits. The association was organized many years ago for the mutual convenience of its members. The appellant had been a member of the association since the year 1900. The association was governed by what is referred to as the articles of the Seattle Clearing House Association. These articles provided, among other things, for the promulgation of rules and regulations. One of the rules which had been made in pursuance of the articles is referred to as rule 4, which provided that the members of the association should not pay interest at a greater rate than four per cent per annum upon savings deposits. This rule was assented to by all the members of the association, and had been in existence for a number of years prior to the year 1916.

During the latter part of the year 1915, there was discussed by the respective officers of the various members of the association the question whether business conditions and sound banking did not require a reduction in the maximum rate of interest that should be paid upon savings deposits. Without following the details of this discussion, it may be said that, on January 14, 1916, a meeting of the association was held at which all the member banks were present, and a rule was there adopted, over the protest of the appellant bank and two other banks, fixing the maximum rate of interest on savings accounts at not to exceed three per cent per annum, to be effective July 1, 1916; twelve of the member banks voting for the rule, three against, and one not voting. After the rule became operative, two of the banks—the appellant and one other—refused to observe it, and continued to pay interest at the rate of four per cent per annum upon savings deposits. This caused further discussion, and finally resulted in a resolution being passed for the dissolution of the association. The object of the association had been the effecting, at one place, of the daily exchanges between the members, the establishing of rules and regulations in matters of common interest and in matters arising from or affecting the relations with banks in other localities, and the fostering of sound and conservative methods of banking. In the conduct of the banking business, each bank daily received a number of checks drawn on other banks in the city of Seattle, which the receiving banks must present to the respective banks on which they were drawn, for the purpose of collecting the amounts thereof. Without the aid of some central association, or the meeting of representatives of the various banks in the city of Seattle at some point at a designated time, at which all banks were represented, it would be necessary for each bank

to present for payment such checks on each of the other banks on which they were drawn. For the purpose of avoiding this difficulty, the Seattle Clearing House Association was organized, at which each of the banks, parties thereto, daily on banking days attended at designated hours for the purpose of clearing their respective checks. For the purpose of paying balances, the members of the Clearing House Association each deposited with the association, subject to the control of its executive committee, a certain amount of gold coin, for which the depositors received what are known as clearing house certificates. When the daily balances were struck in the clearing house, they were covered by these certificates rather than by actual cash.

The appellant claims that the attempt to dissolve the clearing house was not made in good faith and that a new clearing house association would be formed, to which no member would be admitted which did not agree to the rate of interest to be paid upon savings deposits fixed by the association. It is also claimed that the changing of the rate of interest in rule 4 from four per cent to three per cent was the result of a conspiracy on the part of the Seattle banks and banks of certain other cities, and that the fixing of the maximum rate of interest to be paid upon savings deposits at three per cent per annum was an unlawful interference with competition, as it related to the price to be paid for savings deposits. If the fixing of the rate of interest at three per cent was unlawful, it must necessarily follow that the rule as it previously read, fixing it at four per cent, was likewise unlawful. The appellant was a party to the four per cent rule, and if that rule was an unlawful interference with the competitive price that should be paid for the use of money, the appellant was a party thereto. It would seem plain that the appellant cannot come into court seeking to set

aside the three per cent rate as unlawful, when, if this were set aside, it would give the appellant the advantage of a previous four per cent rate which was likewise unlawful. It may be argued, however, that, if the four per cent rule were unlawful as a restraint upon competition, this should be eliminated and the articles and rules enforced subject to this elimination. If this were done, the court would be making a new agreement for the parties, as one of the terms of the agreement under which they had been previously operating provided for the four per cent rate. The court could not well eliminate the four per cent rule and then say that the members should be bound by the other terms of their agreement, as this would be enforcing an arrangement between the parties which they had not themselves made. It must be remembered that this was a voluntary association and that neither the articles nor the rules prescribed that it should be continued for any specified length of time. The courts will not interfere to prevent the expulsion of a member from a voluntary association unless "pecuniary and property rights are involved." *State ex rel. Cicoria v. Corgiat,* 50 Wash. 95, 96 Pac. 689; 5 C. J. 1357.

In the case of a contract of partnership containing no stipulation as to the time during which it shall continue, it exists no longer than the parties thereto may mutually consent, and may be dissolved by either party at his own will at any time; even when the partnership articles fix a certain period of time, it may be dissolved at any time at the will of one partner so as to put an end to the partnership, in the latter case there being a right of action for damages for breach of the contract; but where no time is fixed in the articles of partnership, there exists no such right. *Karrick v. Hannaman,* 168 U. S. 328.

If a partnership may be thus dissolved by any party thereto, it would seem that a voluntary association would at least be equally as subject to dissolution at the will of the majority of the members thereof.

There is another reason why the judgment in this case should be affirmed. The Clearing House Association was the agent and fiduciary representative of all the banks forming the association. *Yardley v. Philler,* 167 U. S. 344.

The duties of such agent to the member banks were continuous. They involved the exercise of skilled knowledge and cultivated judgment concerning the business transacted. Such contracts will not be specifically enforced by the courts. *Texas & P. R. Co. v. Marshall,* 136 U. S. 393; *Marble Co. v. Ripley,* 77 U. S. 339.

While the present action was in form one for an injunction, it was in effect an action for specific performance. A holding that the dissolution of the Clearing House Association be restrained would be equivalent to a holding requiring its continuous operation with the usual service to its members. The violation of a contract will not be restrained when such a holding would indirectly or negatively compel the performance of duties the specific performance of which would not be decreed if the action were brought in that form. *Arthur v. Oakes,* 63 Fed. 310, 25 L. R. A. 414.

The briefs in this case devote much space to the question whether the rule fixing the maximum rate of interest to be paid upon savings deposits at three per cent per annum was an unlawful restraint of competition; but we have found it unnecessary to discuss or decide this question, because, as above pointed out, the appellant is not in a position to invoke the aid of the court when, if successful, it would result in another

rate which the appellant was a party to which would likewise be unlawful.

The judgment will be affirmed.

ELLIS, C. J., WEBSTER, FULLERTON, and PARKER, JJ., concur.

[No. 14307. *En Banc.* May 11, 1918.]

VERNICE HOLT, *by her Guardian etc., Respondent,* v. SCHOOL DISTRICT NO. 71, OF KING COUNTY, *Appellant.*[1]

STATUTES — CONSTRUCTION — RETROACTIVE EFFECT. Laws 1917, p. 332, § 1, providing that no action shall be "brought or maintained" against a school district for noncontractual acts or omissions of officers or employees relating to playgrounds owned or operated by the district does not apply to an action which had gone to judgment against the school district prior to the taking effect of the law in June 1917, notwithstanding the pendency of an appeal by the defendant at that time; since the prevailing party is not "maintaining" an action by appearing and resisting the appeal.

SCHOOLS AND SCHOOL DISTRICTS—TORTS—DANGEROUS PLAYGROUNDS —NEGLIGENCE—EVIDENCE—ADMISSIBILITY—EXPERTS. In an action for personal injuries to a child, sustained in a fall from a slide with a perpendicular ladder, instead of an inclined ladder with flat steps, the admission of the opinion evidence of experts to the effect that the latter would have been safer because the center of gravity in climbing the former falls outside the foot of the ladder, is not prejudicial error, where the jury viewed the ladder and would necessarily reach the same conclusion.

SAME. In such an action, it is not error to allow playground experts to testify as to other apparatus used upon playgrounds with inclined ladders and chutes that were less dangerous as slides, and used for the same purpose.

DAMAGES—FUTURE RESULTS—EVIDENCE—OPINION EVIDENCE. In an action for personal injuries to a child that would in the future result in impairment of mental and physical faculties, the evidence of experts as to injuries that would result with "reasonable probability," is not error.

[1]Reported in 173 Pac. 335.

APPEAL—REVIEW—INSTRUCTIONS AS A WHOLE. Where the instructions as a whole necessarily conveyed the idea that the plaintiff could not recover for injuries which were not the result of defendant's negligence, it is not prejudicial error to refuse to instruct that defendant's negligence must have been the proximate cause of the injury, or to define proximate cause.

SCHOOLS AND SCHOOL DISTRICTS—DANGEROUS PLAYGROUND APPARATUS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Negligence in the maintenance of a playground slide, with a perpendicular ladder, when an inclined ladder with flat steps, or some other kind of chute for slides, would have been safer, is a question for the jury, where a child nine years of age was seriously injured in a fall while attempting to make use of it.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 12, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pupil through falling from a playground apparatus. Affirmed.

Alfred H. Lundin, Edwin C. Ewing, and *S. M. Brackett,* for appellant.

Arthur H. Hutchinson and *James B. Murphy,* for respondent.

PARKER, J.—The plaintiff, Vernice Holt, by her guardian *ad litem,* seeks recovery of damages for personal injuries claimed to have been suffered by her from the negligent maintenance of playground apparatus by the defendant school district. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed to this court.

At the time respondent was injured, she was nine years old. She was then attending the school of appellant. In its schoolhouse yard, appellant then maintained a playground apparatus which, in so far as our

present inquiry is concerned, may be described as follows: The main frame of the structure consisted of two upright posts, 6x6 inches, set in the ground, with another piece, 6x6, resting horizontally on top of and flush with the sides of the posts. The top of the horizontal piece was approximately fourteen feet from the ground. Running up the side of one of the posts was a perpendicular ladder directly under the top piece, with rungs made of iron pipes, approximately one and one-fourth inches in diameter and twelve inches apart. The rungs were inserted, one end in the post and one end in a 2x4 piece which was parallel with and eighteen inches from the post, reaching from the ground to the under side of the top piece. The rungs were set in from the front of the 6x6 posts and the 2x4 about one and one-half inches, so that one climbing up the ladder would find the top piece projecting over the rungs about that distance. Attached to the side of the main frame, back of and opposite the ladder, there were two parallel iron pipes, approximately three inches in diameter and seventeen inches apart, running from the top to the ground on an incline. There were bent iron pipes forming a sort of banisters, projecting above the top in line with the sides of the ladder, to which one could hold while sitting or standing on the top above the ladder. The use intended to be made, and which was made, of this apparatus by the children, was in climbing up the ladder, over the top between the banisters, and sliding down the iron pipes, resting their legs and arms on the pipes. This apparatus was freely accessible to respondent and other children of her age, and the jury might well conclude was intended for their use as well as for the use of older children. On the morning in question, a short time before the commencement of the school session for the day, respondent, while unattended by any one other than her

young playmates, climbed up the ladder with a view to sliding down the inclined iron pipes on the opposite side. When at or near the top, she fell to the ground, fracturing her skull and being otherwise seriously injured, the exact nature and extent of which injuries need not be noticed here. The testimony is in conflict as to whether when she fell she had reached the top of the ladder, as to whether she was endeavoring to reach and climb over the top piece, and as to whether she had climbed over the top and was starting to slide down the inclined pipes; but that she fell from a height of at least ten or twelve feet seems certain. The negligence charged against appellant is, in substance, that the apparatus was inherently dangerous to children of the age of respondent, and that appellant negligently maintained the apparatus on its school grounds accessible to respondent and children of similar tender years and experience, and also that it was negligent in permitting respondent to use the apparatus.

The first and principal contention here made in appellant's behalf is that chapter 92, Laws of 1917, p. 332, now renders appellant free from all liability to respondent, regardless of the time she was injured and regardless of when the judgment in this action was rendered in her favor in the superior court. She was injured, as above described, on March 31, 1916. Judgment was rendered in her favor awarding her damages against appellant in this case on January 12, 1917. The act of 1917, relied upon by appellant as absolving it from liability to respondent, was not passed until March, 1917. Soon thereafter this appeal was taken from the judgment of the superior court. Our recent decision in *Bruenn v. North Yakima School District No. 7,* 101 Wash. 374, 172 Pac. 569, wherein this exact question was reviewed at length, is decisive as against

this contention of appellant. We deem it unnecessary to again review the question here.

It is contended in appellant's behalf that the court erred to its prejudice in admitting in evidence certain opinion testimony of two witnesses who were familiar with playground apparatus generally, and especially of apparatus of this nature. The argument is directed particularly to expressions of opinion by the witnesses as to why this particular ladder was dangerous for small children to play upon. They testified in substance that, in climbing a perpendicular ladder, the center of gravity of the child would fall outside the foot of the ladder, rendering the danger greater than when climbing an inclined ladder; and that flat steps on an inclined ladder were safer for a child than round rungs. Counsel for appellant invoke the general rule that opinion testimony stating a conclusion of the witness upon a question which is for the jury to decide is not admissible, except in particular instances where the witness possesses special knowledge of the subject-matter about which he is testifying, and such subject-matter is one of special knowledge as distinguished from common knowledge. It is argued that the question of the danger in climbing up a perpendicular ladder, as affected by the falling of the center of gravity of the climber outside of the foot of the ladder, is one of such common knowledge that a witness should not be permitted to express an opinion that a child in such a situation would be in greater danger than if it were climbing up an inclined ladder. The same argument is made in substance with reference to the opinions of the witnesses touching the comparative danger to a child in climbing an inclined ladder with flat steps instead of round rungs.

We may concede that the admission of this testimony was error, measured by strict rules, but its very

nature, we think, renders it without prejudice to the appellant. The conclusions testified to in the two particulars mentioned are so self-evident that the jury must have viewed them exactly as the witnesses did, regardless of the witnesses' opinions. Every juror knows that, in climbing a perpendicular ladder, the center of gravity of the climber will fall outside of the foot of the ladder, and that the losing of hand or foot hold upon such a ladder is attended with greater danger of falling than when the ladder is inclined, placing the lower part of it under the climber. The witnesses' opinions touching the danger to a child climbing flat steps on an incline as compared with one climbing on round rungs is not materially different in principle, in so far as the conclusion a juror would necessarily reach is concerned. These expressions of opinion by the witnesses were, in principle, much as if the witnesses had given their opinions as to the result of a simple computation of arithmetic, such as that two and two make four; or had stated any other conclusion from known or assumed facts which the jury must themselves have necessarily reached, regardless of the witnesses' opinions. There is an abundance of authorities sustaining the view that, while such conclusions are not properly admissible as opinion evidence, their admission in evidence is not prejudicial. 4 C. J. 997; 17 Cyc. 60. The decision of this court in *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224, is in harmony with this view.

Counsel for appellant cite our decisions in *Curtis v. Barber Asphalt Paving Co.*, 44 Wash. 334, 87 Pac. 345; *Hogg v. Standard Lumber Co.*, 52 Wash. 8, 100 Pac. 151, and *Christensen v. Hawley*, 61 Wash. 14, 111 Pac. 1061, as opposed to this conclusion. In the *Curtis* case, "in substance the inquiry was whether, in the opinion of the witness, the respondent would be guilty

of contributory negligence under a given statement of facts." Manifestly that was one of the main questions for the jury to decide, and, besides, was not a question as to which all reasonable minds would, under the facts of that case, necessarily reach the same conclusion. The same may be said of the *Hogg* case. In the *Christensen* case, the opinion evidence there held to be inadmissible stated a conclusion almost as self-evident as the one here involved, but a reading of that decision as a whole suggests great probability that the court would not have reversed the judgment for that error alone. It was noticed evidently in view of the new trial which was directed to be had, there being other prejudicial error calling for a new trial. We think that, whatever error there was in the admission of this opinion evidence, it was not in the least prejudicial to the rights of the appellant.

Some contention is made that the trial court erred in permitting these witnesses, who were familiar with and experienced in the use of playground apparatus, to describe other apparatus used upon playgrounds, with inclined ladders having both flat steps and round rungs, and having chutes with solid bottoms for inclines down which the children could slide instead of inclined iron pipes, and of less height. We do not think the admission of this testimony was prejudicial error. It did nothing more than show to the jury that there was other well known playground apparatus, serving substantially the same purpose as this one was intended to serve, which were less dangerous than this one to children of tender years.

It is contended in appellant's behalf that the trial court erred in admitting testimony of medical experts consisting of their opinions as to the probable results of respondent's injury to occur in the future. That respondent was grievously injured and that such in-

jury was resulting in, and would in the future result in, the impairment of her mental and physical faculties in some measure, was clearly shown by other evidence, if it is to be believed. In so far as we are concerned with this opinion evidence, it touches only the question of the degree of such impairment and enhancement of the amount of damages respondent was entitled to. These witnesses referred to certain specified ailments to respondent which, in their opinion, will result from her injuries with "reasonable probability." The argument is that the opinion of the witnesses must go to the extent of saying that such future ailments would occur with "reasonable certainty," that being the expression most generally found in the authorities as to the measure of proof required to warrant the awarding of damages for future ailments to result from the injuries involved. In *Gallamore v. Olympia,* 34 Wash. 379, 75 Pac. 978, Judge Fullerton, speaking for the court, said:

"The court instructed the jury that, if they found the respondent was entitled to recover, they might take into consideration, in making up their verdict, the probable amount of pain, the probable loss of time, and the probable amount of expense, she would suffer and be subjected to in the future on account of her injuries. It is objected to this that it left the jury to give damages against the appellant for consequences which were contingent, speculative, or merely possible, while the rule is that damages for future pain and suffering, loss of time and the like, can only be given when it is reasonably certain that they will ensue as a result of the injury.

"Undoubtedly, it would be error for the court to allow the jury to award damages for matters purely speculative, or for those conditions not supported by a preponderance of the evidence, but we think the instruction complained of is far from doing this. The word probable is defined in Webster's International

Dictionary, as 'Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely'; and in common acceptation the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it; or, at the least, that the evidence preponderates in its favor. In civil actions it is a general rule, to which there are but few exceptions, that the jury may find according to the preponderance of the evidence. We know of no reason why an exception should be made in this instance, and we do not think the courts applying the term 'reasonably certain' to supposed future conditions meant any more than this, but that each of them would have approved an instruction to the effect that the jury might return damages for future pain and suffering if they found, by a preponderance of the evidence, that such pain and suffering would ensue."

The numerous authorities there cited and reviewed lend strong support to this view of the law. Counsel for appellant cite and rely on our decisions in *Bennett v. Oregon-Washington R. & Nav. Co.*, 83 Wash. 64, 145 Pac. 62; *Gifford v. Washington Water Power Co.*, 85 Wash. 341, 148 Pac. 11, and *Godley v. Gowen*, 89 Wash. 124, 154 Pac. 141. In the *Bennett* case, it was said that, "a person is entitled to recover for future pain and suffering only when the jury can find from the evidence that future pain and suffering are reasonably certain." However, there was nothing said in that decision indicating that the court viewed "reasonable probability" as differing materially from "reasonable certainty." The same may be said of the *Gifford* case. In the *Godley* case, it was said:

"This court has held in a number of cases that an instruction is erroneous where the jury are directed that they may find damages for future pain and suffering which would *probably* occur in the future. *Bennett v. Oregon-Washington R. & Nav. Co.*, 83 Wash.

64, 145 Pac. 62. The court in this case did not so instruct the jury, but instructed that they might find for future pain and suffering which the evidence showed the plaintiff would be subjected to. We think this is a correct instruction, and therefore not erroneous. In the *Bennett* case, *supra,* we held, that where there is evidence that the plaintiff will be subjected to future pain and suffering, he is entitled to recover therefor. It is where there is a mere *probability* that the plaintiff will suffer that the instruction is erroneous."

It seems to us, reading this quotation as a whole, it cannot be said to be an overruling of the holding in the *Gallamore* case. We think there was no error committed in receiving this opinion testimony.

It is contended in appellant's behalf that the trial court erred in refusing to instruct the jury that the negligence of the defendant must have been the proximate cause of the plaintiff's injury. It is true that the court did not use the words "proximate cause" or define those words, as counsel for appellant insists it should have done in its instructions. We think it is sufficient answer to this contention to say that we are quite convinced that a reading of the court's instructions as a whole necessarily conveyed to the jury the thought that they could not award to respondent recovery for any injuries which were not the result of appellant's negligence. Counsel seem to argue that the case was submitted to the jury under such conditions that they might get the impression that respondent should be awarded damages for appellant's negligence regardless of whether or not such negligence was the cause of her injuries. We are clearly of the opinion that the instructions did not convey to the jury any such thought, but plainly indicated to the contrary.

It is contended in appellant's behalf that the court erred in not sustaining its counsel's challenge to the

sufficiency of the evidence to warrant any recovery by respondent, which challenge was made by timely and appropriate motions at the conclusion of the trial. A careful review of the evidence, all of which we have read as furnished us in the abstracts prepared by counsel, leads us to the conclusion that this contention is not well founded. The tender age of respondent, the nature of the play apparatus, its height, its perpendicular ladder, the manner in which it was intended to be used and in which it was permitted to be used by respondent, and the manner in which she was injured while playing thereon, we think, leaves little room for arguing that the case was not one for the jury to decide. Nor do we think there is any merit in the contention that the verdict was excessive as to the amount.

Some other errors are claimed in appellant's behalf, but we think they are clearly not such as to call for reversal of the judgment.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, WEBSTER, MAIN, CHADWICK, and HOLCOMB, JJ., concur.

[Nos. 14497, 14498. Department Two. May 11, 1918.]

D. C. THIEMENS, *Appellant*, v. C. T. SANDERS, *as Auditor of Grant County, Respondent.*

J. C. WHITE, *Appellant*, v. C. T. SANDERS, *as Auditor of Grant County, Respondent.*[1]

OFFICERS—RECALL—PETITION—SUFFICIENCY — CONSTITUTIONAL AND STATUTORY PROVISIONS. Under Const., amend. 8, art. 1, § 33, authorizing the recall of an elective officer for malfeasance or misfeasance in office, and Rem. Code, § 4940-1, requiring the charge to state the acts complained of in concise language, a charge against a county commissioner stating in detail facts showing a malfeasance in office by the violation of Rem. Code, § 2334, which makes it a gross misdemeanor to be beneficially interested in a contract to purchase lands for the county, is sufficient, although the charge is of misfeasance rather than malfeasance; since an incorrect designation of the offense would not invalidate the recall petition.

SAME. Under Rem. Code, § 4940-8, requiring petitioners for the recall of an elective officer to file a statement giving the names and addresses of all persons who have contributed or aided and the amount contributed by each, and a detailed statement of all expenditures, the county auditor must file a statement if duly verified, without investigating its truth; and that there are a number of names without cash contributions does not invalidate the petition.

Appeal from a judgment of the superior court for Grant county, Mitchell, J., entered September 24, 1917, dismissing consolidated actions for injunctive relief, tried to the court. Affirmed.

Daniel T. Cross, C. G. Jeffers, Wm. M. Clapp, and *Bausman & Oldham* (*Don. G. Eggerman,* of counsel), for appellants.

W. E. Southard, T. B. Southard, C. J. Lambert, and *N. W. Washington,* for respondent.

MOUNT, J.—These two actions were brought to enjoin the county auditor of Grant county from calling

[1]Reported in 173 Pac. 26.

an election for the recall of the plaintiffs as county commissioners of that county. After a trial, the lower court dismissed both actions. The plaintiffs have appealed.

The issues in the two cases are practically identical. They were tried together in the lower court, and, by stipulation filed in this court, are to be considered upon the same record and briefs.

It is contended by the appellants that the court erred in dismissing the actions; because, first, the petitions filed against the appellants are insufficient; and second, the statement of receipts and expenditures did not comply with the statute.

The charges preferred against the commissioners were made by a committee of taxpayers. These charges, in relation to Mr. Thiemens, were stated in the petition substantially as follows:

First, that Mr. Thiemens was guilty of "misfeasance," in that he, acting with J. C. White, one of the other commissioners—they then and there constituting a majority of the board—passed a resolution of such board to construct a courthouse for Grant county on block eleven (11) of the Third addition to the town of Ephrata, and to authorize the purchase of said block eleven (11) for the purpose of erecting thereon the said courthouse; that this resolution authorized Thiemens, the chairman of the board of county commissioners, to purchase the lots constituting said block eleven (11) at certain stated prices, among which lots were numbers 6 to 13, inclusive, which were authorized to be purchased for the sum of $3,500; that an undivided one-half interest, though not of record, belonged to commissioner Thiemens; that Thiemens has, therefore, been guilty of misconduct as a public officer, in that he is beneficially interested in the sale of these lots to Grant county; and that, under this resolution,

the auditor of Grant county was directed to draw a warrant forthwith to pay for the lots.

Second, that Thiemens committed a further act of misfeasance in his office, in that, with J. C. White, he did, between January 12, 1917, and April 17, 1917, wilfully conspire to cast their several votes in favor of the resolution authorizing the purchase of block eleven (11), though both Thiemens and White knew that Thiemens was the real owner of an undivided one-half interest in lots 6 to 13, inclusive; that the sum of $3,500, proposed to be paid for these lots, was largely in excess of their true value; that, as a part of this conspiracy, Thiemens and White agreed that they should keep secret from the other member of the board, T. H. Twining, their intention to pass this resolution until it was "sprung upon him;" that White and Thiemens further conspired that this resolution should be passed in such a way as to enable Thiemens to close the transaction before the taxpayers of the county would have knowledge of the agreement or an opportunity to prevent its being carried into effect; that Thiemens and White also agreed that the resolution should be passed in a manner so as to direct the county auditor to forthwith issue warrants for the purchase of the lots, in violation of the statutes of this state providing that county warrants shall not be issued until ten days have expired after the date of their allowance; that, in pursuance of this agreement, Thiemens and White, as members of the board of county commissioners, did, on April 17, 1917, produce a resolution having the foregoing effect, and Thiemens then and there stated to White in the presence of Twining: "We might as well spring the white elephant on Tommy," meaning Twining, and that the resolution was passed by Thiemens and White without Twining

having an opportunity to consider the question or discuss it, or view the property to ascertain its value, or to become advised concerning whether property of equal suitability could be obtained for less money, or more advantageously to the interests of the county; that this resolution fixed the value of lots 6 to 13 in the sum of $3,500; that it authorized Thiemens to purchase the property at the amount fixed in the resolution, and directed the auditor of Grant county to draw warrants for the respective amounts and tender to the respective parties owning the said lots the total purchase price of said lots in the block, being $10,600 without the building on lots 1 and 2, or $10,900 with the building, either of which amounts is clearly in excess of the real or marketable value of the lots; and that this resolution was purposely and designedly passed late in the afternoon, immediately before the end of the session of the board then being held, and was the last business performed by the board before its adjournment on April 17, 1917.

In the petition for removal there are also charges of nonfeasance and of violation of the oaths of office of these commissioners in several respects. We think it is unnecessary to set out the petition further.

It is first argued by the appellants that these charges were insufficient because they attempted to charge misfeasance but do not do so. The constitutional provision with reference to the recall of public officers is as follows:

"Every elective public officer . . . except judges . . . is subject to recall . . . whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or has violated his oath of office, stating the matters complained of, . . . is filed . . ." Const., amendment 8, art. 1, § 33.

Section 4940-1, Rem. Code, provides as follows:

"Whenever any . . . committee . . . shall desire to demand the recall and discharge of any elective public officer . . . they shall prepare a typewritten charge, reciting that such officer, naming him and giving the title of his office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated his oath of office, . . . which charge shall state the act or acts complained of in concise language, without unnecessary repetition, . . ."

Section 4940-3, Rem. Code, provides that

". . . the officer with whom the charge is filed shall formulate a ballot synopsis . . . which shall set forth . . . a concise statement of the elements of the charge, . . ."

It will be noticed that the constitution and the statute provide, in substance, that when a public officer "has committed some act or acts of malfeasance or misfeasance while in office, or has violated his oath of office," he is subject to be recalled.

It will also be noticed that the petition filed with the county auditor of Grant county recites that the appellants have been guilty of misfeasance, and then the acts done are set forth. It is not seriously contended by the appellants that the act or acts set forth in the petition do not constitute malfeasance, but it is argued that they do not constitute misfeasance, and, for that reason, the petition for the recall of the commissioners is insufficient. As we read the briefs on the part of the appellants, it is not contended that these acts are not acts of malfeasance. They clearly are such under the statute (§ 2334, Rem. Code), which provides that:

"Every public officer who shall . . .

"(2) Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of

such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; . . .

"Shall be guilty of a gross misdemeanor, . . ."

It is apparent that, if these commissioners were the owners of the lots named in the charge, or beneficially interested therein, and were attempting to, and did, sell the same to the county of which they were the commissioners, which sale was made by these officers for their benefit, they were no doubt guilty of a gross misdemeanor under the law. We think there can be no doubt of the sufficiency of the petition in this respect, and that it charges malfeasance in office. The mere fact that the petition recited that these officers were guilty of misfeasance instead of malfeasance has no merit, because the statute and the constitution require the act or acts done to be stated in plain and concise language. Even if the rule in criminal pleadings must be followed in these petitions, we are satisfied that an incorrect designation of the offense would not invalidate a petition. This court has held that the misnomer of a crime would not vitiate an information otherwise sufficient to charge a crime. *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

Without further considering the other charges in the petition we are satisfied that the one already mentioned is sufficient upon which to base a recall election.

It is next argued that the statement of the receipts and expenditures does not comply with the law. The statute (Rem. Code, § 4940-8) provides that:

"At the time of submitting such petition the person, committee or organization submitting the same shall file with the officer to whom such petition is submitted a full, true and detailed statement, giving the names and postoffice addresses of all persons, corporations and organizations who have contributed or aided in the

preparation of the charge and in the preparation and filing of the petition, with the amount contributed by each, and a full, true and detailed statement of all expenditures, giving the amounts expended, the purpose for which expended and the names and postoffice addresses of the persons and corporations to whom paid, which statement shall be verified by the affidavit of the person or some member of the committee or organization making the charge, and until such statement is filed the officer shall refuse to receive such petition."

The statement of receipts and expenditures contained the names of 135 persons with their postoffice addresses, and with the amount of cash contributed by each; it also contained the names of about 60 persons with their postoffice addresses, but it does not state what these persons contributed. The statement also contains the names and addresses of the persons to whom the money was disbursed, with a detailed statement of the purposes of the expenditures. These statements are properly verified. No question is made upon the regularity of the verification; but it is contended by the appellants that there were a number of persons who contributed money who were not designated in the statement. It is also contended that, because there are a number of names without cash contributions, the statement is insufficient under the statute. In the case of *State ex rel. McCauley v. Gilliam,* 81 Wash. 186, 142 Pac. 470, we held that the county auditor was not authorized to file a petition for a recall where the statement of expenses and disbursements was not verified as required by law. But the statement of receipts and expenses in this case is properly verified. The county auditor, with whom the statement was filed, is not authorized to investigate the items of receipts and disbursements in order to determine its correctness. He must rely upon the affidavit of the person or persons who verify the statement, which, if properly verified,

required him to file the petition and call an election. *State ex rel. Case v. Superior Court*, 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B 838.

If the person verifying such statement makes false verification he is amenable under the criminal law. We are satisfied that the statement complied with the statute, and the defects shown did not require the county auditor to refuse to file the statement, or the petition, or to call an election.

Upon a consideration of all the facts in the case as shown by the record, the trial court properly denied the injunction. The judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and MAIN, JJ., concur.

[No. 13543. *En Banc.* May 11, 1918.]

THE STATE OF WASHINGTON, *on the Relation of South Fork Log Driving Company et al., Plaintiff*, v. THE SUPERIOR COURT FOR PACIFIC COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—NECESSITY—PRACTICABILITY. Upon certiorari to review a finding of public necessity, that the plan invites engineering difficulties will not defeat the proceedings when it cannot be said to be impracticable, as relators lose nothing if the scheme fails.

SAME—NECESSITY—FINDING—SUFFICIENCY. A finding of public necessity is sufficient without finding in terms that the public interest required it, where from the facts found it appeared that plaintiff had a franchise to furnish a city with water, that the city depended upon the company, whose supply was insufficient to meet growing demands, and that the company was condemning in aid of its franchise, in view of Rem. Code, § 925, requiring that the enterprise be public, required in the public interest, and the property sought necessary therefor.

SAME—PROPERTY DEVOTED TO PUBLIC USE—NAVIGABLE STREAM—PUBLIC NECESSITY. A timber company having large tracts adjacent

[1]Reported in 173 Pac. 192.

to a stream navigable for logging purposes, and making prior use of the stream as a highway, cannot resist condemnation thereof by a water company for the purpose of supplying a city with water, but is entitled to recover its damages *pro tanto*, to the extent of its injury; since property devoted to a public use may be condemned for a different public use where there is a public necessity therefor.

SAME—PROPERTY DEVOTED TO PUBLIC USE—ANTICIPATION OF FUTURE NEEDS—PUBLIC NECESSITY. A water company supplying a city with water cannot resist condemnation by another water company for the same purpose, of lands acquired and held by it as a riparian owner on the stream in anticipation of its future needs, where it is not shown that it has put or intends to put the lands to a public use within a reasonable time, or that the same will be necessary for the carrying out of its franchise obligations to the city, or that it has the right or means to divert the water; its right as riparian owner giving it no right to divert the stream (overruling on rehearing, *Id.*, 94 Wash. 691).

SAME—PROPERTY DEVOTED TO PUBLIC USE—DEFENSES. A company supplying water to a city cannot resist condemnation of its riparian rights on a stream by another water company on the ground that it had never been requested and had never refused to furnish a supply of water to the city for all purposes, where it was not using and did not have the right to use the waters if it had been requested to supply additional water.

SAME—PROPERTY DEVOTED TO PUBLIC USE—NECESSITY. A water company having a franchise to supply a city with water may condemn the prior rights of a log-driving company in a stream, whether its rights be destroyed or merely impaired, where by an admeasurement of the public interests it appears that the same will contribute directly to the daily necessities of the public, while the prior use contributes only indirectly and as reflected through the maintenance of a purely commercial enterprise.

MOUNT and FULLERTON, JJ., dissent.

Certiorari to review a judgment of the superior court for Pacific county, Clifford, J., entered May 12, 1916, adjudging a public use and necessity in condemnation proceedings, tried to the court. Affirmed.

Welsh & Welsh, Hayden, Langhorne & Metzger, and *Shepard, Burkheimer & Burkheimer,* for relators.

Fred M. Bond and *P. M. Troy,* for respondents.

CHADWICK, J.—The Willapa Power Company is the assignee of a franchise granted by the city of South Bend for the supplying of power and water for the use of the inhabitants of the city. The power company began an action to condemn certain rights belonging to the relators in the south fork of the Willapa river. A finding of necessity was made by the court below. The franchise of the power company was granted on the 16th day of March, 1914, and is to continue for a period of fifty years.

Before coming to the particular defenses urged by the relators, we shall notice the objection common to all of them—that the scheme of the power company is impractical and can never be created or maintained as outlined in its plans. That the plan will invite engineering difficulties is fairly certain, but we cannot say that it is impractical. Engineers may not agree, but such things cannot be worked out by the courts. Our function is limited to a finding of reasonable practicability, necessity, and public use. If the scheme should fail because of engineering difficulties, relators will not suffer. They must be paid all damages suffered by them before the work proceeds; and if, for any reason, the scheme fails, or the respondent does not put the property to the uses intended, they have ample remedy.

It is next contended that, although the court made a finding of necessity, it did not find that the public interest required the prosecution of the enterprise. The statute, Rem. Code, § 925, provides:

"That the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, . . . and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise."

It will thus be seen that the law requires a finding on the part of the court that the enterprise is (a) a public use, (b) that the public interest requires the prosecution of the enterprise, and (c) that the land or the property is required and necessary for the purposes of such enterprise. *State ex rel. Weyerhaeuser Timber Co. v. Superior Court,* 71 Wash. 84, 127 Pac. 591; *State ex rel. Union Trust & Sav. Bank v. Superior Court,* 84 Wash. 20, 145 Pac. 999, 149 Pac. 324.

While the court does not say in words that the "contemplated use . . . is really a public use," the findings are nevertheless ample to sustain its decree. The court finds the city of South Bend granted the franchise under which the power company is prosecuting its enterprise to the end that the inhabitants of the city might be provided with electrical power for municipal, domestic, and other purposes; that they may have an ample supply of water for domestic uses, sanitary purposes, fire protection, manufacturing, etc.; that the city of South Bend and its inhabitants will depend upon the power company to supply power and water; that its present plant is insufficient to meet the demands of a growing population and that it is necessary to enlarge its plant. This, when coupled with a finding that the power company is proceeding in aid of its franchise, is enough to satisfy the statute. We do not understand that the court is obliged to find in bare words that the contemplated use is a public use, but rather that facts be found from which the legal conclusion that it is a public use can be drawn. In *State ex rel. Weyerhaeuser Timber Co. v. Superior Court,* 71 Wash. 84, 127 Pac. 591, after conceding that public interest is not identical with public use, we said:

"Public interest is nevertheless a necessary concomitant of public use. Where, therefore, as in this case, the only present demand is for public use, and the

public service agencies, a question of benefit or advantage to the public. It is for this reason that courts invariably insist upon a showing of public necessity as well as a public use. The timber company is in no different situation than any other landowner who has been accustomed to use a highway which adjoins or crosses his lands. He is entitled to recover damages *pro tanto* to the extent of his injury.

The Northwest Electric & Water Works Company was organized in 1912, and took over a company which had secured a franchise to supply the inhabitants of the city of South Bend with a supply of water for domestic purposes and for fire protection. Its franchise was granted on the 3d day of April, 1893, and will expire on the same day in the year 1923. The corporate powers of the electric company are primarily to acquire, lease, construct and operate water systems for the supply and sale to municipalities for domestic and other uses and purposes. Its predecessor had been, and it is now, engaged in the business of maintaining and operating a water works system in the city of South Bend. The furnishing of power to the inhabitants of the city is not within the corporate powers of the electric company, nor was it within the corporate powers of its predecessor. Counsel states the position of the company as follows:

"That, prior to the 16th day of February, 1913, Northwest Electric & Water Works, with a view to acquiring and obtaining land and riparian rights and water rights for its present and prospective needs in supplying the said city of South Bend, and its inhabitants, and the inhabitants of territory adjacent to said city, with water under its said franchise and with the knowledge that its then present supply was only adequate and no more than adequate for its then present needs, caused an investigation and survey to be made of possible and available sources of water supply in the

territory adjacent and tributary to the said city of South Bend; that, as a result of such investigation and survey, Northwest Electric & Water Works determined to purchase a tract of 120 acres of land, through which land then flowed, and does now flow and run, the south fork of the Willapa river, and thereupon and on the said 16th day of February, 1913, Northwest Electric & Water Works did acquire by purchase all of the said real estate for the sum of $1,800, together with the water rights and riparian rights appurtenant thereto, for the purpose of constructing and installing a dam on said south fork of the Willapa river upon said land, and a system of water mains therefrom, for the storage, transportation and conveyance of water from said dam to the said City of South Bend, for the purpose of supplying the water works therein, pursuant to statute and said franchises.

"That, at the time of acquiring said real estate and the water rights appurtenant thereto, the same were acquired by the said Northwest Electric & Water Works in good faith with the intention, in good faith, of improving and utilizing the same in the manner, and for the purpose aforesaid, within a reasonable time; that in so acquiring said land and water rights, Northwest Electric & Water Works did so in reasonable anticipation of the future needs of the said city of South Bend; that at this time it is its intention, in good faith, to so use and improve said land and water rights, that there is a necessity for so using and improving said land and water rights in the immediate future, and that it is its intention, in good faith, to so improve and utilize said land and water rights in the immediate future; that said site has the most available water supply for the purposes contemplated by Northwest Electric & Water Works, and that they have no other use for said land and water rights than for the purposes aforesaid, and have made no use of said premises, and will make no use of the same, except for the purposes aforesaid, and that they have the ability to prosecute the development of said site at such time as it may become necessary; that there has been no abandonment of Northwest Electric & Water Works' intention to so use said property."

Reduced to its lowest terms, this statement is no more than this: that the electric company, in anticipation of a future necessity, has purchased land riparian to the south fork of the Willapa river. It is not shown that the company intends to put the land to a public use within any reasonable time, or that it will be necessary to the carrying out of the franchise obligations of the company during the few remaining years of its franchise. Neither is it shown, except by way of bare allegation, that its present sources of supply will not be ample or adequate to meet the demands of the public. Its right, therefore, if any, to block the plans of the power company lies in the fact that it is a riparian owner. This gives it no right to divert the waters of the stream. The electric company cannot carry flowing waters to their water system in the city of South Bend because of their ownership of the land. In the absence of a showing of intention, and a present acquiring of a right to divert the water, and a way to divert and carry it, and granting that an intended use may be reasonably postponed, we think the case of the electric company falls within the rule of *State ex rel. Kettle Falls Power & Irr. Co. v. Superior Court,* 46 Wash. 500, 90 Pac. 650, and *Chehalis v. Centralia,* 77 Wash. 673, 138 Pac. 293. In the latter case we said:

"The city of Centralia could not acquire the right to divert the waters of the stream for municipal uses by acquiring the lower riparian rights. Its rights are those of riparian owners; no more and no less; and it may be that respondent will have to extinguish those rights before it can divert the waters of the stream."

It is further argued that the land and riparian right of the Northwest Company cannot be taken by the power company in aid of its purpose to supply water to the inhabitants of the city of South Bend, it nowhere appearing that the city had ever requested it,

or the company ever refused, to furnish a supply of water for all purposes. But this argument is manifestly unsound, for, under the authorities cited, the Northwest Company is not only not using the waters of the stream, but could not put them to the uses contemplated by its franchise if it had been requested to supply additional water. Neither the water nor the right to take it away is in the Northwest Company. It will not be heard to urge as a defense that it has not been called upon to supply a thing which it does not own.

The South Fork Driving Company was organized in 1902 under the statute authorizing the formation of driving and booming companies. It caused a survey of the south fork of the Willapa river to be made, and thereafter filed a plat of the stream with the secretary of state. It has complied with all the laws, and has all the powers given to logging and driving companies by the statutes. It has since conducted a business of driving and booming logs.

The court found that there is a large amount of timber tributary to the south fork of the Willapa river, but refused to find that it would be either impossible or impractical to construct a logging road along the stream for the purpose of removing the timber. The court also found that a dam which claimant has constructed below the proposed dam of the petitioner, and without which its driving operations could not be carried on, would be rendered useless, and refused to find that the claimant had constructed two dams, one above and one below, the proposed head works, or that either of them would be rendered useless by reason of petitioner's undertaking.

But this seeming contradiction will not avail anything in this proceeding. For the law, as we understand it to be, will permit the petitioner to take the

property of the claimant driving company whether its right to drive and boom logs in the stream be destroyed or merely impaired.

This is clearly so where, by an admeasurement of the public interest in the two enterprises, it is clear that the one will contribute directly to the daily necessities of human life, health and happiness, and the other is contributing only indirectly, and then only as the public use is reflected through the maintenance of a purely commercial enterprise.

This court is firmly committed to the doctrine that one corporation may appropriate the property of another corporation—the test being the extent and manner of the proposed use as compared with the present use. *Samish River Boom Co. v. Union Boom Co., supra.* The court was not put to the necessity of resting its decision in any general principles of law or equity. So far as we are concerned, the rule emerged from a rational construction of the statutes. It was restated in *State ex rel. Portland & Seattle R. Co. v. Superior Court,* 45 Wash. 270, 88 Pac. 201:

"All the facts and circumstances attending each case must be considered in order to determine whether there is, or is not, a reasonable public necessity for taking the property which is already devoted to a public use."

and in *State ex rel. Union Trust & Sav. Bank v. Superior Court, supra:*

"In all condemnation cases the paramount consideration is the public interest, and to that interest all rights must bow and all rules must bend."

We find no error.

Judgment affirmed.

ELLIS, C. J., MAIN, WEBSTER, and HOLCOMB, JJ., concur.

MOUNT, J. (dissenting)—I cannot agree to the conclusion of the majority as above stated.

This case was first heard by the department. At that time the judgment was reversed upon the ground that no necessity was shown for another public service corporation to do the same business as an old one was then engaged in. Afterwards a rehearing was granted and the case heard *En Banc*. The department opinion may be found in *State ex rel. South Fork Log Driving Co. v. Superior Court,* 94 Wash. 691, 163 Pac. 15, where the principal facts are stated. The record shows conclusively that the Northwest Electric & Water Works has been furnishing water and electricity to the city of South Bend for a number of years. The Willapa Power Company, a new company, seeks to furnish the same service; and in order to do so, seeks to condemn a tract of land, with its riparian rights, now owned by the Northwest Electric & Water Works, which land contains the only available and sufficient water supply tributary to the city of South Bend. This tract of land was purchased by the Northwest Electric & Water Works in anticipation of its future needs for water. Mr. Shepard, president, and Mr. Andrus, vice president and manager of the Northwest Electric & Water Works, each testified that the present supply of water was barely sufficient to meet present needs; that the population of the city was increasing; that, in dry spells, the supply ran short; that the demand for water was increasing; that they intended, within a reasonable time, to utilize the water from this tract of land, and that its use was necessary. (Relators' Abstract, pp. 113, 142 and 143.)

There was no dispute of these facts and no attempt to contradict them, notwithstanding what is said in the majority opinion concerning them; so that the real and controlling question in the case is, May one public service corporation, seeking to perform the same service as another public service corporation, condemn and

take over property of the other corporation reasonably necessary for that other to continue in business? In short, may a new public service corporation condemn an old one of the same kind out of business? The effect of the majority opinion is to answer this question in the affirmative. I am satisfied that this may not be done, and that the department opinion states the rule of law upon that question.

I therefore dissent.

FULLERTON, J., concurs with MOUNT, J.

[No. 3. Disbarment Proceedings. May 11, 1918.]

In the Matter of the Proceedings for the Disbarment of JAMES B. BRUEN.[1]

CONSTITUTIONAL LAW — COMBINING LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL POWERS—ATTORNEYS—DISBARMENT. The power to hear and determine the right of an attorney to practice law being inherent judicial power, Laws 1917, p. 421, giving to the state board of law examiners the power to hear and determine disbarment proceedings, creates a judicial tribunal, which at the same time is combined with the administrative and delegated legislative power to examine applicants for admission to the bar, investigate the conduct of attorneys, and initiate complaints for disbarment, in violation of Const., articles 2, 3 and 4, providing for three separate and distinct branches of government.

ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS—POWERS OF EXAMINERS—STATUTES—ELIMINATING INVALID PORTION. Laws 1917, p. 421, giving the state board of law examiners power to examine applicants for admission to the bar, and to investigate the conduct of attorneys, initiate complaints and hear disbarment proceedings, subject to review by the courts, though unconstitutional in so far as it authorizes them to enter judgment of disbarment, is sustainable as to the delegated legislative and administrative functions, and authorizes the board to pass upon the evidence received, and report the same to the supreme court; since the valid is separable from the invalid portions of the act.

[1]Reported in 172 Pac. 1152.

Courts—Supreme Court—Attorneys—Disbarment. The supreme court having been vested with the exclusive power to admit and enroll attorneys, and having inherent power to disbar them, the legislature could by Laws 1917, p. 421, vest it with exclusive jurisdiction of disbarment proceedings, upon reports made to it by the state board of law examiners.

Constitutional Law—Due Process—Attorneys—Right to Practice—Notice—Proceedings. Laws 1917, p. 421, providing for the disbarment of attorneys, upon notice and complaints made to and heard by the state board of law examiners, reported to the supreme court, does not violate the constitutional inhibition against the taking of property without due process of law, or any other constitutional provisions, except in so far as it authorizes a final judgment by the state board.

Petition filed in the supreme court December 24, 1917, to review the findings of the state board of law examiners in disbarment proceedings. Affirmed.

F. M. Roberts and *R. P. Oldham,* for petitioner.

The Attorney General and *Hance H. Cleland* and *Thos. F. Murphine, Assistants,* for respondents.

Geo. H. Rummens, Fred G. Clarke, Ogden & Clarke, Walter Schaffner, Edward H. Wright, Magill & McKenney, McMasters, Hall & Drowley, and *N. B. Brooks, amici curiae.*

Holcomb, J.—This proceeding was instituted under the Laws of 1917, ch. 115, p. 421. The complaint in disbarment by the chairman of the board of law examiners alleges that Bruen's "conduct of the affairs of said Charlotte Isom constituted unprofessional conduct as an attorney at law and involved moral turpitude to such an extent that his right to practice his profession as an attorney at law in the state of Washington should be revoked." The matter was brought on for hearing before the chairman of the board of law examiners, who heard the testimony at Seattle, Washington, in October, 1917.

After taking the testimony and hearing the argument in the matter, the full board of law examiners made findings to the effect that the charges against the attorney were true, and conclusions to the effect that his right to practice law had been forfeited; that he should be disbarred and his name stricken from the roll of attorneys of this court and of the state of Washington. They thereupon made an order to that effect, which was filed in this court under the provisions of Rule 21 of this court. Within thirty days after the filing of the report and findings, Bruen filed his petition to review the findings of the board of law examiners.

In limine he contends that the act of 1917, in so far as it seeks to delegate to the board of law examiners the function of hearing and determining the question of his fitness to continue in the practice of the law, is unconstitutional as an encroachment upon the judicial powers conferred by the constitution upon the courts.

Several briefs and arguments have been filed by *amici curiae,* all of which take the same position as to the constitutionality of the law, except that of Mr. Rummens. The principal propositions advanced to defeat the law are: (1) That it attempts to confer upon the state board of law examiners judicial powers and functions which can only be exercised by the courts provided for in the constitution; (2) that it violates § 6 of art. 4 of the constitution, which provides that the superior court shall have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested in some other court; (3) that it violates the fundamental principles and purposes of the state constitution, and particularly articles 2, 3, and 4 thereof, which provide for the three separate and distinct branches of government, because the act provides that the board shall exercise adminis-

trative, legislative and judicial powers and functions in the same matter or proceeding; (4) that the act violates § 3 of art. 1 of the state constitution and the 14th amendment to the constitution of the United States, in that it deprives persons of their liberty and property without due process of law; (5) that it violates § 12 of art. 1 of the state constitution and the 14th amendment to the United States constitution, in that (a) it constitutes class legislation, (b) abridges privileges and immunities of the citizens of the United States, (c) denies to persons within the jurisdiction of the state of Washington the equal protection of the laws; (6) that it violates § 8 of art. 6 and § 7 of art. 27 of the state constitution, which require that all state officers be elected by the people.

It is apparent that the act was modeled after the legislation providing for the regulation and forfeiture of licenses of physicians and surgeons, which was sustained in *State Board of Medical Examiners v. Jordan*, 92 Wash. 234, 158 Pac. 982, and *State Board of Medical Examiners v. Macy*, 92 Wash. 614, 159 Pac. 801. Similar legislation regulating certain professions has been sustained in regard to dentists *(State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889), and school teachers *(Van Dyke v. School District*, 43 Wash. 235, 86 Pac. 402). We have held in *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071, that the power to strike from the rolls an attorney is inherent in the court itself; that no statute or rule is necessary to authorize punishment in proper cases; that statutes and rules may regulate the power but they do not create it; that this power is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients; that attorneys may forfeit their professional franchise by abusing it, and

the power to exact the forfeiture is lodged in the courts which have authority to admit attorneys to practice; that such power is indispensable to protect the court, the administration of justice, and that attorneys themselves are vitally concerned in preventing the vocation from being sullied by the conduct of unworthy members.

The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice, and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers. Among the inherent powers is the power to admit to practice, and necessarily therefrom the power to disbar from practice, attorneys at law. Formerly attorneys were admitted in various courts. The legislature, with a view of bringing about uniformity in the requirements and standards for admission of attorneys, conferred the whole matter of admission of attorneys upon this court, and this court is the only court entitled to admit and enroll attorneys in the state of Washington. The evident purpose of ch. 115, Laws of 1917, p. 421, was to remedy and prevent mischiefs.

"At common law, an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment, or information was ever necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No

formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in other cases by an order to show cause why he should not be stricken from the roll; and, when the courts judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made by a master without issuing any process whatever, and on the coming in of his report will cause his name to be stricken from the roll." *In re Randall,* 11 Allen (Mass.) 473.

Under the statutes of this state a comprehensive system has been adopted with reference to the admission, suspension, and disbarment of attorneys. The power to admit, so far as the statutes of this state are concerned, is vested in the supreme court. The cases are fairly uniform upon the proposition that admitting to practice, suspending, and disbarring are judicial functions. The legislative power, in the interest of uniformity of standard and to remedy and prevent mischiefs in the profession, may regulate and restrict this power, but cannot take it away. It may provide machinery for the administration of the regulation provided by the legislature, as in carrying into effect such regulations some agency is necessary. In this instance it has provided the machinery and agency of the state board of law examiners. This board has, as urged in several of the arguments before us, been granted powers which partake of the nature of legislative, administrative or executive, and judicial. Certainly it is judicial power that is conferred when it is given the power to hear and determine the right of a person to continue the practice of law, and it not only hears and determines the right of a person to practice law, but it initiates complaints against such persons, which is the function of an administrative officer. These func-

tions, it has been urged, have been combined in the state board of medical examiners, in the state board of dental examiners, and in other such boards, and their powers and functions have been upheld. But those professions and occupations are not filled by persons who are solely and exclusively officers of the court and under the control and regulation of the courts. The boards regulating them are administrative boards with some incidental quasi-judicial powers which cannot be exercised by them finally but are subject to review by the courts, and a review by the courts in those cases must go before a court of original and general jurisdiction; to wit, the superior courts. It is obvious that the board of law examiners has been created a sort of inferior court, inferior only to this court, for a review is provided for from that board to this court only.

These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts. Now, it is evident that, under our constitution, this board may exercise such delegated legislative powers as have been granted to it, which are the examination of applicants

for admission to the bar and the prescribing of certain rules; and they are competent to exercise the administrative powers conferred upon them of investigating the conduct of attorneys who have been admitted, to ascertain whether or not they should be permitted to continue to practice their profession, in order that the mischiefs sought to be remedied by the legislature may be remedied and prevented, and may initiate complaints in such cases and hear the evidence, and make reports and findings thereon. But the board is not a court and cannot exercise the functions of a court, except the limited function of passing upon evidence received by them and reporting it. They can make no order striking the name of an attorney from the rolls or disbarring him from practice.

The question then arises whether effect can be given to chapter 115 by eliminating the provisions authorizing the board to enter judgment or enter judicial orders or simply have the board make their findings and reports to this court. It is vigorously contended in several of the arguments before us that no court in this state has original and general jurisdiction except the superior court, and that therefore any report or findings made by any such administrative board should be made to the superior court for review and order, and that the legislation before us not so providing, there is no way to proceed to disbar an attorney except by proceeding originally in the superior court.

Much strength is given to this view by the decision of this court in *In re Waugh*, 32 Wash. 50, 72 Pac. 710. In that case, Judge Dunbar, writing for the court, held that the supreme court has no jurisdiction of proceedings for the disbarment of an attorney, either under constitutional authority or by virtue of its inherent powers, although the attorney may have perpetrated a fraud upon the superior court in gaining admission to

practice. The decision was by a divided court, three of the judges signing the prevailing opinion and two of them the dissenting. It has long been held that the court which has power to admit attorneys has also the power to disbar them. That principle was overlooked in the *Waugh* case. If this court has not the power conferred upon it by legislation to pass upon the qualifications for admission to the bar of applicants therefor, and of enrolling them as the only court of the state having such power, a great many attorneys in this state have not been legally admitted to practice. The *Lambuth* case, hereinbefore quoted, in our opinion, held contrary to the decision in the *Waugh* case, and *In re Robinson*, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, also held to the contrary. We are of the opinion that the *Lambuth* and the *Robinson* cases proceeded upon the right principles and are in conflict with the *Waugh* case, and that the *Waugh* case is in conflict with the very great weight of authority. As to the matter of original jurisdiction in such proceedings, we now believe it should be, and it is, overruled.

We are of the opinion that this court, having been exclusively vested with the power of admitting attorneys to practice, may also be exclusively vested with the power of disbarring attorneys from practice. While it is a matter of great importance to the private practitioner, it is also a matter of great public concern. Having the sole and exclusive power in such matter, not prohibited by any constitutional provision, and not infringing in any way upon any legislation of the state except that part of chapter 115 last discussed, the legislature provided an intermediary agency whereby the power of the court could be more generally and efficiently exercised. To that extent the legislation was warranted and valuable. The invalid portion is mani-

festly separable from the valid portions of the act, which may, therefore, be sustained.

There is no merit in the contention that the legislation takes property or property right without due process of law in violation of the state and Federal constitutions. Notice and hearing are provided for, and the final hearing will be speedily had in the court of last resort of the state without any considerable expense to the person accused. This meets every requirement of the constitutions. We hold, therefore, that the act is in all respects constitutional, except the provision for a final order or judgment of disbarment by the board of law examiners. It will be their duty henceforth, upon proceeding against any person accused under the act, to have a hearing and report their findings to this court. No judgment or order shall be made by them, but the matter shall be determined and reviewed by this court in accordance with the rules which we have already adopted: Rules 21, 22, and 23, entered March 27, 1918. Rule 23 will necessarily have to be amended to conform to this decision. The matter is before us to review the report and findings of the investigating board, made after a hearing upon due notice.

As to the facts in this case, we have examined the record and are firmly convinced that the findings and conclusions of the board of law examiners are justified, and that the petitioner has forfeited his right to practice, and his name shall be stricken from the roll of attorneys.

Ellis, C. J., Chadwick, Mount, Parker, Webster, and Main, JJ., concur.

Fullerton, J., concurs in the result.

[No. 13951. Department Two. May 23, 1918.]

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*, v. J. H. GRASSMEYER *et al.*, *Respondents*.[1]

INJUNCTION—UNLAWFUL OCCUPATIONS—PARTIES SPECIALLY INTERESTED — MUNICIPAL CORPORATIONS — JITNEYS — REGULATION. A street car company having a franchise to carry passengers for hire in a city may maintain an action to enjoin, as unlawful interference therewith, the carriage of passengers, cutting down its revenues, by motor vehicles in defiance of Rem. Code, § 5562-37 *et seq.*, regulating the privilege and requiring as a condition precedent that such carriers give a bond to protect passengers against personal injuries; and it is immaterial that the company has no interest in the bond.

SAME—RESTRAINING NUISANCE—UNLAWFUL OCCUPATIONS—JITNEYS. Such action is maintainable, since to engage in any form of business in defiance of laws regulating the same is a nuisance *per se*, to be enjoined by any one suffering a special injury thereby; even though there be legal remedy by arrest and punishment.

MUNICIPAL CORPORATIONS — STREETS — JITNEYS — REGULATION. A "for hire" license, under Rem. Code, § 5562-1, does not authorize the carriage of passengers for hire in cities of the first class, until the owner has complied with Id., § 5562-37 *et seq.*, requiring, as a condition precedent, the giving of a bond to protect passengers from personal injuries.

SAME. Rem. Code, § 5562-37 *et seq.*, requiring a bond for the protection of passengers in motor vehicles operated for hire in cities of the first class, applies whether the vehicles are operated over fixed routes or not.

SAME—USE OF STREETS—MOTOR VEHICLES—REGULATION—BONDS—CONSTITUTIONAL LAW—DUE PROCESS—EQUAL PROTECTION OF LAWS. The jitney bus act, Rem. Code, § 5562-37 *et seq.*, requiring city motor carriers of passengers for hire to give a security bond executed by a qualified surety company, is not invalid because of the fact that there are no qualified surety companies from which such bonds are obtainable; since the state in the exercise of its police power can prohibit the use of the streets as a place of private business.

INJUNCTION—UNLAWFUL OCCUPATIONS—PARTIES SPECIALLY INTERESTED. Where the sole business of a street railway company is de-

[1]Reported in 173 Pac. 504.

rived from the fares collected from passengers carried, any deprivation of such fares is an interference with its property and special damages if in violation of law, entitling the company to injunctive relief.

INJUNCTION—UNLAWFUL OCCUPATION—JITNEY BUSSES. In injunction to restrain the operation of jitney busses in violation of a city ordinance, an answer that defendant's motor vehicles are not operated as jitney busses, states a good defense.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered October 14, 1916, in favor of the defendants, dismissing an action for injunctive relief, tried to the court. Reversed.

Newman & Kindall and *Clinton W. Howard,* for appellant.

R. W. Greene and *Morris J. Schwartz,* for respondents.

FULLERTON, J.—The appellant, as plaintiff, began this action in the court below seeking injunctive relief. It divided its complaint into two causes of action. In the first it alleged, in substance, that it now is, and that it and its predecessor in interest for many years past have been, operating, under valid franchises having many years yet to run, a system of street railways for carrying passengers in the city of Bellingham, which it has constructed and equipped at a cost exceeding $1,000,000; that it operates its street cars on convenient schedules, in compliance with its franchises and the laws of the city of Bellingham as expressed in its ordinances and the laws of the state of Washington as expressed in its statutes, and will continue to do so unless compelled to cease operations through losses caused it by the action of the defendants; that the city of Bellingham enacted an ordinance which, among other things, defines jitney bus operation, prescribes an occupation tax for each bus and each driver

thereof, and makes it unlawful to engage in that business without obtaining a license and permit so to do; that none of the defendants have complied with the requirements of the ordinances; that they have been, for many months prior to the filing of the complaint, using, operating and driving motor propelled vehicles as jitney busses in violation of the ordinance and in disregard of its provisions and in such manner as to constitute a nuisance; that their action is specially injurious to the plaintiff, in that they run at excessive rates of speed, and dart in front of the plaintiff's cars, thus compelling them to stop suddenly to avoid collisions; that they run dangerously close to the cars when stopped to receive and discharge passengers, thus endangering the lives of such passengers; that they pick up and carry passengers who would otherwise ride on the plaintiff's cars, thus causing a loss of revenue from seventy-five to one hundred dollars per day; that, if the operation of the defendants is permitted to continue, the losses suffered by the plaintiff will compel it to cease operating its street cars, to its irreparable loss and damage and to the damage of the people of the city of Bellingham. The second cause of action sets forth the same state of facts as the first, with the exception that the law alleged to be violated by the defendants is ch. 57 of the acts of the legislature of the state of Washington for the year 1915 (Laws 1915, p. 227; Rem. Code, § 5562-37 *et seq.*), in that they have not procured and filed the bond therein required as a condition precedent to the operation of motor propelled vehicles in cities of the first class.

On filing its complaint, the plaintiff sought a temporary injunction, which was granted upon its second cause of action and denied as to the first. The defendants then demurred to the complaint, which demurrer

being overruled, they answered, making certain denials and setting up four affirmative defenses.

In the first affirmative defense it is alleged that the defendants operate their motor propelled vehicles as automobiles for hire, and not as jitney busses or auto stages; that they operate both within and without the city of Bellingham, and in part on streets and highways not covered by the plaintiff's railway tracks; that they have procured and operate under "For Hire" licenses from the state of Washington, issued pursuant to chapter 142 of the Laws of 1915, p. 385 (Rem. Code, § 5562-1 *et seq.*), and have obtained and hold "taxi" licenses from the city of Bellingham; that to confine their business within the scope of the ordinance set forth in the plaintiff's complaint would render the business unprofitable; and "allege and aver that plaintiff well knows that the business of the defendants and each of them would be utterly and totally destroyed if defendants entered into the contract and agreement with the city of Bellingham prescribed in said alleged ordinance;" and that the sole object and purpose of plaintiff in prosecuting this action is to attempt to compel the defendants through litigation, to abandon their business.

In the second defense the matters set forth in the first are adopted and made a part thereof by reference. It is then alleged that the nature of the business carried on by the defendants is a public service in the line of transportation for hire to the public generally; that the defendants and each of them in rendering such service use the public highways of the city of Bellingham and Whatcom county generally; that, pursuant to the constitution and the laws of the state of Washington, municipal corporations, including cities of the first class, are prohibited from granting exclusive franchises and monopolies, and that the ordinance

set forth in the plaintiff's complaint grants an exclusive franchise and monopoly and was not otherwise passed pursuant to the charter of the city.

The third defense refers to and adopts by reference the allegations of the first and second defenses and sets up as new matter the inability of the defendants, at any reasonable cost, to procure the bonds required by chapter 57 of the Laws of 1915, p. 227 (Rem. Code, § 5562-37 *et seq.*).

The fourth affirmative defense adopts and incorporates therein by reference the allegations of the three preceding defenses, and further sets up that the plaintiff itself operates motor propelled vehicles in the city of Bellingham in violation of law; that it entered into agreements with certain of the respondents under which the differences between them concerning their several rights might be tested in the courts, which the plaintiff violated, and avers that, for these reasons, it is not in court in its present action with clean hands.

Demurrers were interposed by the plaintiff to the several affirmative defenses. These were sustained in part and overruled in part, whereupon the plaintiff filed a reply containing admissions and denials and new matter in explanation and avoidance. A demurrer to much of the new matter was interposed by the defendants, on which no separate ruling was made by the court. The parties thereupon entered into the following stipulation:

"It is stipulated between the parties hereto by their respective attorneys as follows:

"(1) It is the contention of the defendants that the bond required to be filed with the secretary of state by chapter 57 of the legislative acts of the state of Washington for the year 1915 is to secure against personal injury only and that the plaintiff is not a beneficiary in any bond required to be filed by such act, and (a) that by reason thereof the plaintiff is not en-

titled to maintain the second cause of action set forth in its complaint, as the facts therein alleged are insufficient to constitute a cause of action, and (b) that for the same reason, since ordinance 2543 makes it a condition precedent to the issuance of a jitney bus license, as well as to the issuance of a driver's permit, that the applicant must have first filed the bond and obtained the permit required by such act of the legislature, the plaintiff is not entitled to maintain the first cause of action set forth in its complaint, as the facts therein alleged are insufficient to constitute a cause of action.

"(2) It is the contention of the plaintiff that, irrespective of whether such bond is to secure against personal injury only, and irrespective of whether the plaintiff is or is not a beneficiary in any bond required to be filed with the secretary of state by chapter 57 of the legislative acts of the state of Washington for the year 1915, the plaintiff is entitled as a matter of law upon the facts alleged in its complaint and in its reply to the defendants' amended answer to maintain each of the causes of action set forth in its complaint, and that the facts alleged in each are sufficient to constitute respectively a first and second cause of action as set forth in such complaint.

"(3) Should the court be of the opinion that the contentions of the defendants as set forth in paragraph 1 hereof are well founded in law, it may treat the demurrers of the defendants to the "Reply to Amended Answer" (filed under one cover October 5th, 1916) as a demurrer to the complaint and reply, and in the event such contentions of the defendants and such demurrers are sustained, that the plaintiff be allowed an exception as to each contention and each demurrer sustained, as well as an exception to the court's failure to sustain the contention of the plaintiff set forth in paragraph 2 hereof.

"(4) Should the court be of the opinion that the contentions of the defendants as set forth in paragraph 1 hereof are not well founded in law, but that the contention of the plaintiff as set forth in paragraph 2 hereof is well founded in law, and should the court

overrule such contentions of the defendants and such demurrers, an exception is to be allowed to the defendants as to each contention and each demurrer so overruled, as well as an exception to the court's failure to sustain the contentions of the defendants as set forth in paragraph 1 hereof.

"(5) This stipulation is entered into in order to furnish to the defendants the opportunity of speedily presenting to the trial court the disposition of this case independent of technicalities on what defendants contend to be a controlling question of law, with the right in either party to except and timely appeal to the supreme court."

The cause was then submitted to the judge of the superior court on the pleadings as supplemented by the stipulation, and the following judgment entered:

"On this the 14th day of October, 1916, this cause coming on for the entry of this order, plaintiff appearing by Newman & Kindall and C. W. Howard, its attorneys, and all of the defendants excepting the defendant A. L. Allen appearing by Morris J. Schwartz and Craven & Greene, their attorneys, and the court having examined the stipulation between the plaintiff and all of the defendants excepting the defendant A. L. Allen, which stipulation was filed herein on the 14th day of October, 1916, and the court being of the opinion that the contentions of such defendants as set forth in paragraph 1 of such stipulation are well founded in law, sustains the same and pursuant to the 3d paragraph of such stipulation treats the demurrers of such defendants to the 'Reply to Amended Answer' (filed under one cover October 5th, 1916) as a demurrer to the complaint and reply and hereby sustains such demurrers and each of the same, to all of which the plaintiff asks and is severally allowed an exception, including a separate exception to the failure of the court to sustain the plaintiff's contention set forth in paragraph 2 of such stipulation and including a separate exception to the sustaining of such contentions of such defendants, and a separate exception to the sustaining of each separate demurrer considered as addressed to

both the complaint and reply. The plaintiff now electing in open court to stand on such complaint and reply and declining to further plead,

"It is by the court ordered that plaintiff's action be and the same is hereby dismissed at plaintiff's costs in the sum of $—— to be taxed by the clerk of this court."

The plaintiff appeals.

From the recitals in the stipulation and judgment it is gathered that the trial court rested its conclusion on the ground that neither of the causes of action set out in the plaintiff's complaint stated a cause of action because the plaintiff was not a beneficiary of the bond required by statute to be given by operators of motor propelled vehicles carrying passengers for hire in cities of the first class as a condition precedent to such operation. The reasoning seems to be that, since the bond required to be executed by the operators of jitney busses in the class of cities named is only for the protection against personal injuries of passengers carried, the plaintiff, as an operator of a different mode of carriage, has no interest therein and cannot, for that reason, complain of a violation of the statute or ordinance. But it has seemed to us that this reasoning does not meet the actual cause of action set forth in the complaint. In substance, the cause of action set forth is, that the plaintiff has a franchise authorizing it to operate a street car system in the city of Bellingham by which it carries passengers for hire; that the defendants engage in the business of carrying passengers for hire in the same city in violation of both the ordinances of the city and the state statutes, and that such operation is specially injurious to the plaintiff, as it deprives it of revenues which it would otherwise receive. The actual question presented, therefore, is, do these facts entitle the plaintiff to injunctive relief.

It is our opinion that a cause of action is stated in each of the separate causes of action set forth in the complaint, and this for at least two reasons: First, the plaintiff has a franchise granted it by the sovereign power authorizing it to carry passengers for hire on the streets of the city of Bellingham. This franchise is property, and any unlawful interference therewith is actionable. It is true the franchise is not exclusive in the sense that the sovereign power may not grant a similar right to another, but it is exclusive against any one who assumes to exercise the privilege of carrying passengers in the absence of authority or in defiance of the laws regulating the privilege. To do so is unlawful, and since the plaintiff is injuriously affected thereby, it is entitled to injunctive relief. *Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C 1045, L. R. A. 1916B 1143; *Walker v. Armstrong*, 2 Kan. 198; *Patterson v. Wollmann*, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1; *Tulsa St. R. Co. v. Oklahoma Union Traction Co.*, 27 Okl. 339, 113 Pac. 180; *Memphis St. R. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890; McQuillin, Municipal Corporations, § 1771; Pomeroy, Equitable Remedies, §§ 583, 584.

Again, to engage in any form of business in defiance of laws regulating or prohibiting the business is a nuisance *per se*, and a person so engaging therein may, in this jurisdiction, be enjoined from so doing by any one suffering a special injury thereby. Rem. Code, §§ 943, 944, 8316; *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513; *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053; *Ingalls v. Eastman*, 61 Wash. 289, 112 Pac. 372; *Cunningham v. Weedin*, 81 Wash. 96, 142 Pac. 453.

And such an action will lie even though there may be for the wrong committed the legal remedy of arrest and punishment. *City Cab, Carriage & Transfer Co. v. Hayden,* 73 Wash. 24, 131 Pac. 472, Ann. Cas. 1914D 731; *Huntworth v. Tanner,* 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D 676; *State ex rel. Berry v. Superior Court,* 92 Wash. 16, 159 Pac. 92.

These conclusions, it is plain, require a reversal of the judgment in so far as it is founded upon the insufficiency of the facts stated in the complaint. The respondents, however, suggest other matters appearing on the face of the pleadings which are thought to require an affirmance, and these it is proper to briefly notice. It is said that the respondents are operating lawfully within the city of Bellingham in virtue of having taken out "For Hire" licenses under chapter 142 of the Laws of 1915, p. 385 (Rem. Code, § 5562-1 *et seq.*), and of having obtained a permit to operate in the city of Bellingham under an ordinance of that city. But the "For Hire" license alone does not permit the carrying of passengers in motor propelled vehicles in cities of the first class. Before that privilege is authorized, a bond must be furnished and a permit obtained pursuant to chapter 57 of the statutes of the same year. Nor is the latter statute inapplicable because the respondents do not operate on fixed routes, or because they charge different rates of fare for different distances, or because they sometimes carry passengers across the boundary lines of the city. The prohibition is against carrying passengers within a city of the first class in the vehicles named, and is operative so long as the passenger is being carried therein in the prohibited vehicles, no matter over what route, for what fare, or to what destination. Nor does the permit obtained from the city authorize such carriage. If it purports so to do, it is not only in violation of

the statute last referred to, but is in violation of the later ordinance upheld by this court in the case of *Allen v. Bellingham,* 95 Wash. 12, 163 Pac. 18.

Again, it is said that the bond required by the statute is impossible of procurement. This, however, is not an admitted fact in the record. While it is so alleged in one of the affirmative answers, it is denied in the reply, and as the case now stands is not to be taken as true. But conceding it to be true, it would not constitute a defense. This we have held in the recent case of *Hadfield v. Lundin,* 98 Wash. 657, 168 Pac. 516.

Finally, it is said that the damages alleged are not special within the meaning of the rule permitting injunctive relief against one who unlawfully interferes with the property rights of another. If we have correctly caught the respondents' meaning, the objection is that losses inflicted upon the plaintiff are incidental rather than direct, since there is no actual injury to its physical property. But the rule is not so narrow as the objection assumes. The sole income of the plaintiff's business is derived from the fares collected of passengers whom it carries, and any deprivation of these fares is an interference with its property—wrongful and subject to be restrained by injunction, if the interference is in violation of positive law or otherwise without legal right. Such is the effect of our decisions in *Cherry Point Fish Co. v. Nelson,* 25 Wash. 558, 66 Pac. 55, and *Ingersoll v. Rousseau, supra,* and the point was directly so ruled in the case cited from the Tennessee reports.

Since there must be a reversal, it remains to inquire what form of judgment shall be directed. As to the second cause of action, it is plain that the affirmative matter in the answer constitutes no defense, since it is admitted that the bond required by the statute

therein set forth has not been procured by the defendants, and since such a bond is required by carriers of passengers in cities of the first class in motor propelled vehicles, whatsoever may be the form of such carriage. As to the cause of action founded upon the city ordinance, a defense is stated, since the ordinance is directed against jitney bus operation, and the respondents have denied that they operate their vehicles as jitney busses as such operation is defined in the ordinance. Our conclusion, therefore, is that the temporary injunction issued should be kept in force until such time as the defendants comply with the bonding statute and make a showing of such compliance to the trial court. As to the first cause of action, the issue of fact suggested may be tried out and a judgment entered in accordance with the fact as it may be then determined.

The judgment entered is reversed, and the cause remanded with instructions to proceed as herein directed.

MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 14651. Department Two. June 4, 1918.]

OLYMPIA BREWING COMPANY, *Appellant*, v. THE STATE OF WASHINGTON, *Respondent*.[1]

INTOXICATING LIQUORS—LICENSE—RECOVERY OF FEES—VOLUNTARY PAYMENT. Where, in order to close out its business when the state wide prohibition law was to go into effect on January 1, 1916, a brewing company was compelled to take out a state license for the fiscal year commencing July 1, 1915, the payment for the full year was not a voluntary payment, and the fees exacted by the state for the last half of the term during which the license could not be used may be recovered from the state, regardless of whether they were paid under protest or not.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered September 21, 1917, upon sustaining a demurrer to the complaint, dismissing an action to recover the unearned portion of liquor license fees. Reversed.

Bigelow & Manier and *Troy & Sturdevant*, for appellant.

The Attorney General, Glenn J. Fairbrook, Assistant, and *C. E. Arney, Jr.*, for respondent.

MACKINTOSH, J.—In the year 1915, the appellant was engaged in the brewing business in this state, and in order for it to continue to operate its business, it was necessary to secure state liquor licenses, which, under the law (Laws of 1907, ch. 194, p. 419; Rem. Code, § 6269 *et seq.*), commenced with the fiscal year, July 1, 1915. The appellant applied for the licenses desired by it and offered to pay for licenses which would expire January 1, 1916, at which time the prohibition law would go into effect, by force of which the appellant would be compelled to discontinue doing business. The state board of tax commissioners, which was the board

[1]Reported in 173 Pac. 430.

vested with the authority to grant liquor licenses, refused the tender made by the appellant and demanded the entire annual license fees for licenses from July 1, 1915, to June 30, 1916. Thereupon the appellant paid, under protest, the amount demanded, and has begun this action to recover the amount of the fees collected for licenses for the last half of the term, during which the licenses were unused. The appellant is also seeking to recover in this action similar amounts collected from various retail liquor dealers who have assigned their claims to the appellant. The payments made by these various assignors were made under the same circumstances as the payments made by the appellant itself, except that they were made without protest. The respondent contends in defense to this action that these payments were all voluntary payments, and therefore the appellant is not entitled to a recovery.

At the time the licenses were applied for by the appellant and its assignors, they were engaged in a business which was lawful under the then existing laws of this state, and it continued to be a lawful business until January 1, 1916. It was a business in which the appellant had a large amount of capital invested, and the state had recognized, in the passing of the prohibition law, that an opportunity should be given to the appellant and those similarly situated to close out their businesses before the taking effect of that law. The fact that the fees were paid with or without protest is of no moment if their payment was made under compulsion, and it cannot be gainsaid that payments made to prevent the sacrifice of large capital investments are not voluntarily made but are made as the result of compulsion. *Robertson v. Frank Bros. Co.*, 132 U. S. 17; *Swift Co. v. United States*, 111 U. S. 22. When the applications were made for the licenses, the respondent knew that the licenses were being sought

for the purpose of continuing the business then being conducted by the applicants, and knew that that business would, by force of law, cease upon January 1, 1916. It knew the licenses would, by operation of law, be valueless to the applicants after January 1, 1916. By demanding the payment of a license fee for the entire year the state has secured money for which it has given nothing in return. It cannot be stated that payments made under such circumstances as are disclosed by the record in this case were voluntarily made. The applicants were compelled, in order to continue a business which was legal and to protect themselves from heavy financial loss, to make the excessive payments demanded. The state does not now contend that it had any moral or legal right to compel the taking out of a license for twelve months for the conduct of a business which it would not allow to continue for a period beyond six months, but rests its right to retain the money upon the theory that the payments were voluntarily made. In view of the compulsion exercised, the state certainly should not be allowed to successfully maintain a lower standard of honesty than it insists upon its citizens observing. This court has heretofore under similar circumstances said:

"The respondent paid his money for a consideration which he has, in part, failed to receive, by reason of the act of the city. On the other hand, the city has received money for the granting of a privilege which it has repudiated and annulled. It is, therefore, in justice and equity, bound to repay it." *Pearson v. Seattle,* 14 Wash. 438, 44 Pac. 884.

See, also, *Bart v. Pierce County,* 60 Wash. 507, 111 Pac. 582, 31 L. R. A. (N. S.) 1151; *State ex rel. Maddaugh v. Ritter,* 74 Wash. 649, 134 Pac. 492.

The judgment of the superior court will be reversed.

MAIN, C. J., CHADWICK, and HOLCOMB, JJ., concur.

[No. 14687. Department Two. June 4, 1918.]

In the Matter of the Estate of CARL EICHLER. MARIE PREUSS, *Appellant*, v. ANNA BERG, *as Executrix, Respondent.*[1]

APPEAL—RECORD—EXHIBITS. Where a statement of facts is struck out, the court cannot consider exhibits which are made a part of the statement.

WILLS—CONTESTS—ABUSED DISCRETION—STATUTES. Under Laws 1917, p. 648, § 19, substituting a discretionary power to award costs in will contests for the arbitrary rule of Rem. Code, § 1313, requiring costs to be awarded against an unsuccessful contestant, it is an abuse of discretion to award costs against a contestant who made out a *prima facie* showing of probable cause for contesting a will, it being made to appear that the testator had executed a prior will in favor of contestant and had probably been unduly influenced to execute a later will.

Appeal from a judgment of the superior court for Mason county, D. F. Wright, J., entered August 7, 1917, dismissing a will contest, after a trial to the court. Modified.

Adolph Loewe, for appellant.

T. M. Vance and *R. A. Lathrop*, for respondent.

CHADWICK, J.—The statement of facts was heretofore stricken and we cannot inquire into the merit of the court's decree. We are not unmindful of the contention of the appellant that we may nevertheless consider the exhibits, and which in themselves will show that the decree of the court is ill founded in fact. It is true that the exhibits were not stricken *eo nomine*, but inasmuch as the exhibits are made by statute and the certificate of the trial judge a part of the statement of facts, it follows that they went out under our previous order.

[1]Reported in 173 Pac. 435.

However, the question whether the court erred or abused its discretion in taxing costs and an attorney's fee of $400 against the contestant is still in the case.

Respondent contends that the attorney's fee is not disproportionate or excessive when measured by the value of the estate, which was appraised at $5,758. This argument would be attractive if the payment was to be made out of the estate and to counsel who had successfully resisted the contest. But the case presents itself from another angle. The statute under which the court taxed costs and attorney's fees against the unsuccessful contestant is:

"If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess costs against the contestant, which costs may in the discretion of the court include a reasonable attorney's fee." Laws of 1917, ch. 156, p. 648, § 19.

The former statute is as follows:

"The fees and expenses shall be paid by the losing party. If the probate be revoked or the will annulled, the party who shall have resisted such revocation shall pay the cost and expenses of proceedings out of the property of the deceased." Rem. Code, § 1313.

In *Jasinto v. Hamblen*, 79 Wash. 590, 140 Pac. 677, the court met the insistence of counsel that an allowance for attorney's fees and costs to nonsuccessful contestants should be paid out of the estate, by quoting the statute and saying that there was no provision of the code under which the costs and expenses of an unsuccessful contest could be paid out of the estate. The court observed that it was of opinion that neither the law nor good conscience demanded that the unsuccessful contest of a will should result in costs and counsel fees against the estate, advancing the reason that such a ruling would, in effect, place a reward upon the con-

test of every will disposing of large estates. See, also, *Hunt v. Phillips,* 34 Wash. 362, 75 Pac. 970; *In re Rathjens' Estate,* 45 Wash. 55, 87 Pac. 1070. There is much merit in the observance of the court, but it is evident that the legislature was not impressed with the reasons given other than its quotation of the statute, for it is evident that that body foresaw the possibility of a contest that might be meritorious and which in justice the contestant would have a right to wage, although unsuccessful in the end. This case would fall in the latter class, for here we have a situation made entirely by the deceased person. He made two wills, one sustained by the declarations and habit of years and the tie of blood, the other by no sustaining grace other than the cold writing on the page.

To measure the present law we must consider the old law, for a presumption carries in all changes in statute law that the legislature had in mind a mischief (a mischief of various rules, 40 Cyc. 1362), and a remedy, and we must attribute a motive for the striking out of the arbitrary provisions of the old law and a substitution of a discretionary power to award costs and attorney's fees unhampered by any restrictions within the realm of reasonable discretion.

Counsel for respondent cite *In re Gorkow's Estate,* 20 Wash. 563, 56 Pac. 385, and *In re Statler's Estate,* 58 Wash. 199, 108 Pac. 433, but they go but a little way, if at all, to sustain their position, for in each of those cases the allowances were made out of the estate. They were not charged as a money judgment against an unsuccessful contestant.

So that the only question for us is whether the trial judge abused his discretion. We are convinced that he did, and for two reasons. The charge was made as costs against contestant as a losing party, which is primarily unsound, and contestant made a *prima facie*

showing of probable cause for contesting the will. It appears from the petition that appellant is a niece of the deceased, Eichler; that deceased had often expressed an intention of making her his sole heir, and to that end had prepared a will as early as July 22, 1913, in which he had devised all of his estate, saving two legacies of $1 each, to her, and to avoid all question or chance of loss had put the will in her hands for safe-keeping; that he had an affection for his niece which was more than casual, for he had directed that his "body be decently buried under the direction of my beloved niece, Marie Preusse." This will was proposed in the petition for contest. It is further alleged that, in 1916 and shortly before the execution of the later will, Eichler was living alone, was aged and infirm, sick in body and mind, and subject to undue influence and coercion; that the respondent occasionally attended him; that he was eccentric, quarrelsome, suspicious and easily frightened and intimidated; and that, because of his helplessness and dependence, respondent, a stranger to his blood, with mercenary intent, prevailed upon him to reverse his avowed intention to leave his property to appellant and to make her the devisee of the great bulk of his property. It is further alleged that, a short time thereafter and while sick at a hospital in Seattle, where he had gone for surgical treatment, he caused a letter to be written to the scrivener and custodian of the later will at Shelton, directing him to send it to him at Seattle, and that the will did so arrive in due course of mail on the morning after the night of his death.

Surely this is a showing of probable cause—a color of title, if you please—and to penalize appellant for daring to ask an adjudication upon a subject-matter that in right and conscience is probably her own, would be to do a great wrong and tend to discourage the as-

sertion of legitimate claims. We think our statute was intended to cover just such cases as we have here, and that the exercise of a sound discretion demands that the costs be taxed against the estate and that no attorney's fees be charged to appellant.

The cause is remanded with instructions to modify the decree accordingly. Appellant will recover her costs on appeal.

HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14820. Department Two. June 4, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. FANNY DAUGHERTY, *Appellant*.[1]

ASSAULT AND BATTERY—SELF-DEFENSE—SUFFICIENCY OF EVIDENCE. In a prosecution for assault, where the accused could not say whether she struck the prosecuting witness or was warding off a blow when he turned after being jabbed in the back, there was no evidence of self-defense to warrant an instruction thereon.

APPEAL—REVIEW—HARMLESS ERROR—PRESUMPTION. Since error is not presumed, a remark of the court in excluding certain evidence, to the effect that the jury must "disregard all testimony," will be considered as referring to the testimony under consideration.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered December 28, 1917, upon a trial and conviction of assault. Affirmed.

A. E. Rice and *Gus L. Thacker*, for appellant.

Herman Allen and *J. H. Jahnke*, for respondent.

MACKINTOSH, J.—The appellant claims that the jury, which found her guilty of assault in the third degree, was improperly instructed. Error is assigned in the giving of an instruction upon the defense of self-defense, and the refusal to give another instruction pro-

[1]Reported in 173 Pac. 437.

posed by the appellant on the same subject. A careful reading of the record shows that the following is the only testimony referring to self-defense:

"He said, 'Damn you, you can't bluff old Morgan Hunt' [the prosecuting witness]. He started off and I gave him a jab with my gun in the back. He turned and then I guess he struck his head. . . . Mr. Hunt started to go off from me and I called his attention and asked him to please give me the note. I don't know whether I jabbed him or was warding off the lick, I was mad and excited. . . . Q. All you did was to poke Mr. Hunt in the back? A. I jabbed Mr. Hunt in the back to attract his attention. Q. You deny striking him over the head? A. I don't know. I put up my gun to ward off the lick. Q. You may have struck him with your gun over the head? A. Yes."

It was the duty of the court to determine, as a matter of law, whether sufficient proof had been introduced to warrant the submission to the jury of the defense of self-defense, and in this case the court should have determined, as a matter of law, that there had been no such evidence introduced. Therefore, the refusal of the court to give the instruction requested was not error, and the instruction which was given was harmless. *State v. Cushing,* 17 Wash. 544, 50 Pac. 512; *State v. McPhail,* 39 Wash. 199, 81 Pac. 683; *State v. Ash,* 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611.

The other error assigned is that the court, during the trial, used the following language: "The jury must disregard all testimony." The record discloses that this instruction or remark was made after an argument had been had in regard to the admissibility of certain evidence, and the record shows that, just prior to the making of this remark, the court had said: "In view of the objection of the prosecuting attorney . . . the objection will be sustained as to the introduction

of the proposed paper." Thereupon the court used the language complained of. We do not think this could have prejudiced the appellant in any way, for the court proceeded with the testimony in her behalf, and certainly we cannot presume that the jury understood the court intended it to disregard all the testimony in the case, but that the language used merely referred to the testimony which at that time was under consideration. Error is never presumed, and, on the contrary, the presumption must be that the proceedings were correct, where the record is susceptible of two constructions. *Francioli v. Brue,* 4 Wash. 124, 29 Pac. 928; *Seattle v. Whitworth,* 18 Wash. 126, 51 Pac. 345; *Carpenter v. Barry,* 26 Wash. 255, 66 Pac. 393; *Powers v. Washington Portland Cement Co.,* 79 Wash. 1, 139 Pac. 615.

The judgment is affirmed.

MAIN, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14823. Department Two. June 4, 1918.]

GRACE F. DILATUSH, *Respondent*, v. HOWARD B. DILATUSH, *Appellant*.[1]

DIVORCE—SUIT MONEY—TEMPORARY ALIMONY — EVIDENCE — SUFFICIENCY. A wife is not entitled to suit money and temporary alimony out of community property of little consequence where it appears that it was all necessary to the maintenance of an established business, and it appears that she is possessed of a large amount of money and property and is living at home at the expense of the defendant.

APPEAL—DECISIONS APPEALABLE—FINAL ORDER—TEMPORARY ALIMONY. An order for the payment of attorney's fees and monthly alimony *pendente lite* is appealable as a final judgment, under Rem. Code, § 1716, subd. 1, authorizing an appeal from the final judgment entered in an action or proceeding.

Appeal from an order of the superior court for King county, Mackintosh, J., entered December 7, 1917, awarding suit money and alimony pending an action for divorce. Reversed.

H. E. Foster, for appellant.

CHADWICK, J.—The respondent brought action for divorce against the defendant, and upon an order to show why suit money and alimony *pendente lite* should not be paid to plaintiff, the court made an award of $75 for suit money and $100 per month as alimony. Plaintiff alleges that the parties are possessed of no community property other than a stock of drugs of the approximate value of $3,000, and a Reo automobile of the probable value of $600. She alleges that defendant has been guilty of cruelty and indignities rendering the marriage relation intolerable, and, *inter alia*, that defendant has failed and neglected to provide her a suitable and proper home; has kept his family boarding and living in hotels and lodging houses; has failed,

[1]Reported in 173 Pac. 431.

neglected and refused to provide her with proper clothing; that she has been obliged "to depend upon contributions from her relatives and on her own personal resources for the greater part of her clothing," and that defendant is a druggist and capable of earning $300 per month. She does not allege that defendant is possessed of property other than his interest in the community property, or anything as to the earnings of his business.

In obedience to the order to show cause, defendant filed an affidavit alleging that he would, in due time, answer the complaint and make out a complete defense thereto; that the parties, at the time of the filing of the affidavit, were living together in the same house; that plaintiff was in and about the store every day; that they had made at least one trip to Seattle together since the bringing of this action; that plaintiff was possessed of independent means; that she had a bank account in the Bank of California, in the city of Seattle; that she had a bank account in the savings department of the Union Savings Bank and Trust Company, in Seattle; that she had a checking account in the People's State Bank in Enumclaw, and that she is not in need of any funds or money whatsoever. It is further alleged that plaintiff is the owner of five liberty bonds of the value of $100 each, which she purchased with her own funds, and that she is possessed of a large amount of money and property.

The complaint and the affidavit filed in response to the order to show cause is certified by the trial judge as a part of the statement of fact. It also contains all of the minutes and proceedings that occurred in the cause. It can hardly be said that the complaint of the plaintiff will bear the interpretation of a showing of necessitous circumstances. The order to show cause does not seem to have been issued upon any independ-

ent showing of fact made by affidavit or otherwise. The return of defendant, which is not denied, brings the case fairly within the rule announced in *Gust v. Gust,* 69 Wash. 220, 124 Pac. 504, where we said, "The present application seems to proceed upon the theory that a wife can, because of her relationship merely, demand that her spouse meet the expenses of a suit for divorce."

A wife is entitled to suit money to insure an efficient preparation of her case, and is entitled to alimony, whether payable out of community funds or out of the separate property of the husband, but no hard and fast rule should be laid down for the disposition of such cases. Although the wife has independent means, if it be shown that there is community property which is available for the payment of such charges, she would nevertheless be entitled to an allowance out of the community property almost, but not absolutely, as a matter of right; but where, as in this case, and upon the wife's own showing, it is made to appear that the community property is of little consequence and is not liquid, but devoted to the maintenance of an established business or stock in trade, and there is no showing that there is any surplus of money, or that the business is earning more than is necessary to meet current expenses, it should not be held, even for the wife's own good in the end, that she be allowed, in order to maintain her action, to interrupt the business that her own private means may be conserved. All equities arising out of the relations of the parties may be settled by the court after a full hearing. On the showing made, the plaintiff would not be entitled to recover full alimony in any event, for it is asserted, and not denied, that she is living in the same place and under the same circumstances as before, and at the expense of the defendant. A question may arise in

the mind of the reader of this opinion as to whether the order made by the court is an appealable order. That question was decided by this court in *State ex rel. Surry v. Superior Court*, 74 Wash. 689, 134 Pac. 178.

Reversed, and remanded with instructions to deny the motion.

MAIN, C. J., MITCHELL, MOUNT, and HOLCOMB, JJ., concur.

[No. 14630. Department Two. June 6, 1918.]

C. SALVINO, *Plaintiff*, v. TAYLOR MILL COMPANY, *Defendant.*

CEDAR LAKE LOGGING COMPANY, *Appellant*, v. LEE MCKINSTRY, *as Receiver, etc.*, *Respondent.*[1]

APPEAL—BONDS—OBLIGEE—"ADVERSE PARTY." Upon appeal in insolvency proceedings involving only a contest between two creditors as to the priority of their claims, the receiver is not the "adverse party" to whom the appeal bond must be given, especially where the contestants stipulated to relieve the estate from the costs of an appeal if either appealed.

SAME—BONDS—DEFECTS—AMENDMENTS. Where the bond on appeal is not given to the "adverse party," it is void and is not amendable, under Rem. Code, § 1734, allowing amendments in matters of form and to cure defects.

Motion to dismiss an appeal from an order of the superior court for King county, Ronald, J., entered September 18, 1917, allowing claims against an insolvent and fixing their priority. Granted.

J. E. Frost and *Jones & Riddell*, for appellant.

Shorett, McLaren & Shorett and *Jno. A. Coleman*, for respondent Foster.

[1]Reported in 173 Pac. 433.

MACKINTOSH, J.—Claims against the insolvent mill company were presented to the receiver by the Cedar Lake Logging Company and George T. Foster, trustee. The claim of Foster was adjudged by the court the first and prior claim against the fund in the hands of the receiver, and the claim of the Cedar Lake Logging Company was adjudged superior to all the other claims against the fund except that of Foster. The fund in the hands of the receiver was a great deal less than the amount of the claim of the Cedar Lake Logging Company and only exceeded the claim of Foster by some $20. From the order allowing these claims and fixing their priority, the Cedar Lake Logging Company took this appeal and filed an appeal bond in which the receiver of the Taylor Mill Company was named as obligee. The matter is now here on the motion of Foster to dismiss the appeal for the reason that no proper appeal bond has been furnished, his contention being that the receiver is not an adverse party in the appeal, and a bond running to him does not comply with the statutory requirements of an appeal bond.

The matter involved in the appeal is purely a contention between the two creditors as to the priority of payment of their claims, each of which has been allowed by the receiver, who is not interested in the matter of their priority one to another, the entire fund in his hand being depleted no matter which claim is paid first.

It is true that receivers are empowered to bring and defend actions and that they represent the creditors interested in the estates being administered by them, and, in the ordinary cases, individual claimants would not be permitted to indulge in independent litigation of controverted questions which the receiver is already defending; but, in the case at bar, the receiver has no interest, and there are no creditors' interests for him

to protect, and, moreover, the order being appealed from contains and adopts a stipulation made between the Cedar Lake Logging Company and Foster which provides "in case of any appeal being taken to the supreme court from this order, the costs of such appeal shall be borne by the parties themselves, and shall not be paid out of the funds of said receivership." We take it that, by this stipulation, the parties have tacitly agreed that the receiver has no part in the appeal, even going to the extent of relieving the estate in his hands from the costs of such appeal. Under these circumstances it cannot be said that the receiver was the "adverse party" to whom the statute required a bond to be given, for he was not the party whose interest would be affected in any way by a reversal or modification of the order appealed from. He occupies merely the position of a stakeholder of a fund to be paid over to whichever of the two contending creditors is finally determined to be entitled to the priority of payment.

It is suggested that the appeal bond might be amended under the authority of Rem. Code, § 1734, which provides that the court shall allow amendments in matters of form to cure defects in proceedings on appeal to the end that substantial justice may be secured to the parties. We cannot accede to this suggestion for the reason that the objection to the bond is not one as to its informality or defect; the bond, having been given to one who is not an adverse party, was void, and the statute does not provide that a void bond may be cured by the giving of a valid one. *Carlson v. Vashon Navigation Co., ante* p. 75, 172 Pac. 860.

The motion for the dismissal of the appeal is granted.

MAIN, C. J., CHADWICK, HOLCOMB, and MOUNT, JJ., concur.

[No. 14504. *En Banc.* June 6, 1918.]

THE STATE OF WASHINGTON, *on the Relation of the State Bank of Seattle, Appellant,* v. J. W. SCOTT, *as Treasurer of the Town of Westport, et al., Respondents.*[1]

APPEAL—RECORD—STATEMENT OF FACTS—ABSTRACT. Under Rem. Code, § 1730-8, failure to abstract the evidence is not ground for striking the statement of facts.

MUNICIPAL CORPORATIONS—WARRANTS — ASSIGNMENT. Purchasers of municipal warrants take subject to all defenses that may be made against them.

SAME—WARRANTS—VALIDITY. A municipal warrant is not issued or valid until delivered into the hands of the person authorized to receive it.

SAME—PUBLIC IMPROVEMENTS — CONTRACTS — RIGHTS OF ASSIGNEE AND SURETY ON CONTRACTOR'S BOND. A city contractor may, prior to default, assign installments due and payable from the city, and the rights of the assignee being superior to those of the surety upon the contractor's bond completing the work, the city cannot subsequently issue valid warrants therefor to the surety.

SAME. Such warrants would be invalid, even in the hands of purchasers without notice through the assignee's failure to file or give written notice of the assignment.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered June 23, 1917, upon findings in favor of the defendants, in an action to compel the payment of warrants issued against a local improvement fund, tried to the court. Affirmed.

Corwin S. Shank and *H. C. Belt,* for appellant.

James P. H. Callahan, for respondent Scott.

W. H. Abel, for respondent Armstrong.

HOLCOMB, J.—A motion, made by respondent Armstrong to strike the statement of facts and dismiss the

[1]Reported in 173 Pac. 498.

appeal because the statement of facts comprises somewhat more than one hundred pages and no abstract thereof was prepared, served and filed, was passed for consideration on the merits. It is now denied as not proper remedial procedure under Laws of 1915, p. 303, § 8 (Rem. Code, § 1730-8).

This action was brought to compel the treasurer of the town of Westport to pay certain warrants, issued by the town against the fund of a local improvement district of the town, which are held by relator.

On December 28, 1914, the town entered into a contract with one Christiansen for the construction of certain street improvements specified in an ordinance creating local improvement district No. 1. The parts of the contract which are material in this controversy provided that the contractor should commence work within twenty days after the execution of the contract, and prosecute the work with a sufficient force of men and sufficient tools and machinery and complete the whole and every part thereof within the period of ninety days, or on April 1, after the execution of the contract; that, in consideration of the full performance of the work by the contractor, the town agreed to pay the contractor in warrants drawn by the town against the special fund provided by the town in the enlarged local improvement district No. 1, at the following rates and measurements:

Clearing	$75.00
Grading 100 cubic yards at 35c	350.00
Bridge and culverts, concrete	150.00
7535 square yards of concrete roadway at $1.14 per square yard	8,578.50
Total	$9,153.50

It was agreed that payment to the contractor should be made in the following manner: Warrants should

be drawn by the town clerk upon the special fund above described, on the first day of each calendar month as the work progressed. Warrants were to be issued for eighty per cent of the work estimated by the city engineer in charge, both for labor and material performed and used upon the job during the preceding calendar month, and the remaining twenty per cent should be retained until thirty days after the work should have been finally accepted by the town of Westport through its duly qualified officers. The contractor was required to furnish a surety bond in the penal sum of $9,153.50, conditioned for the faithful performance of the contract and for the protection of all laborers, mechanics, subcontractors and materialmen, and all persons furnishing the contractor, or any of his subcontractors, labor, provisions and supplies for the carrying on of the work, and all persons who would be entitled to liens if the work were not being done for a municipal corporation.

In accordance with the provision therefor, Christiansen gave a bond in the sum required with the Guardian Casualty & Guaranty Company as surety. The bond obligated the surety, in the event of the default of the principal, to indemnify against any loss under the contract according to its terms, and provided that, in the event of any default on the part of the principal, a written statement of the principal facts showing such default and date thereof should immediately be delivered to the surety by registered mail at its address, and that the surety should thereupon have the right to proceed, or procure others to proceed, with the performance of the contract; and that the surety should also be subrogated to all the rights of the principal, and any and all moneys or properties that may, at the time of such default, be due, or that thereafter may become due, to the principal under the contract should

be credited upon any claim which the obligee might make upon the surety, and the surplus, if any, applied as the surety may direct, to indemnify it against loss or damage by reason of its suretyship.

Christiansen entered upon the work and furnished material and labor which, at the unit prices specified in the contract, amounted to $652 in the month of January; in February, $208.72; in March, $2,547.50. On February 19, 1915, Christiansen borrowed about $2,000 from one B. F. Armstrong, for which he gave a note payable on demand, with interest at eight per cent per annum, and on February 23, 1915, Christiansen executed an assignment to Armstrong of all warrants due or to become due to Christiansen for and in consideration of the performance of the contract with the town, and authorized and directed the proper officers of the town to make and deliver such warrants to Armstrong to the extent of $2,074.18. This assignment was not filed by Armstrong with any officer of the town at the time it was given, but the court found, with evidentiary support therefor, that, shortly after February 23, 1916, Armstrong notified the town of Westport of the assignment to him by Christiansen in the sum of $2,039.60; that the town had actual notice and knowledge thereof during the whole of March. The council took no action upon this information, and no record was made thereof in the records of the council or otherwise.

At a meeting of the council held March 29, a letter from Christiansen was read notifying the town of Westport that he had voluntarily thrown up his contract for paving the streets on account of not being able to finance the same. Thereupon a motion was adopted that the clerk be instructed to notify the bonding company by registered mail of the facts contained in the notice from Christiansen, and also telephone

their agent at Seattle. In obedience to this instruction, the clerk notified Mr. Aylmore, the attorney in fact of the bonding company, that Mr. Christiansen had abandoned the contract and that the town required the bonding company to immediately proceed to the completion of the contract. Mr. Aylmore went at once to Westport and consulted with the mayor and the town clerk. He found that there were six claims filed against the contractor for about $1,000 for labor and about $3,500 for material, and that the town officers were retaining $2,039.60, being the eighty per cent under the contract upon the estimate for work done in March. It was thereupon agreed between Aylmore and the mayor and town clerk that, if the bonding company would pay the bills which had been filed and proceed with the work, they would issue to him warrants for the above sum. In accordance with this agreement, the mayor and town clerk issued and delivered to Mr. Aylmore warrants against the fund amounting to $2,039.60; and Mr. Alymore, for the surety company, then paid the bills and completed the contract, all at an aggregate expense of about $12,300, for which they received from the town, including the above warrants, the sum of $9,210, making a loss to the surety company of about $3,000. At the next meeting of the town council after the transaction between Aylmore and the mayor and clerk, the council passed a resolution or motion ratifying the action of the mayor and clerk in delivering to the bonding company warrants for the March estimate under the contract amounting to $2,039.60. This was all done, of course, upon the theory that the surety was substituting itself for its principal and entitled to take all sums due him. At the time of receiving the warrants, Aylmore had no knowledge or notice of the Armstrong assignment or any claim on the part of Armstrong, and there was

no record of any such claim. Upon receiving the warrants, the bonding company immediately sold them to the Northern Bond & Trust Company, and subsequently relator became the owner of them.

On May 17, 1915, Armstrong filed with the town clerk a claim against the bond in the sum of $2,000 for money which he claimed he furnished Christiansen for the purpose of paying for work and materials used in the construction, and again another claim for $2,060 was filed on May 28, 1915. In neither of these claims was the assignment mentioned. Subsequently, on about June 31, 1915, Armstrong commenced an action in the superior court of that county against Christiansen, the surety company, and the town of Westport, to recover upon the claim filed against the bond. The superior court decided that there was no cause of action against the bonding company. Thereupon Armstrong was permitted to file an amended complaint to ask judgment against the city for $2,039.60, being eighty per cent of the March estimate; and, after a trial, the court, on July 8, 1916, dismissed the surety company and gave Armstrong judgment against the city for the $2,039.60, to be paid out of the funds of the improvement district. This judgment was not appealed from by the town and became final. In accordance with that judgment, the officers of Westport issued warrants to Armstrong in that amount, and the intervener, Minnie R. Armstrong, is now the owner of them. On July 17, 1916, the council of the town of Westport passed a resolution declaring the warrants held by relator to be null and void and directing the treasurer to refuse payment thereof. At the time of the commencement of this action, the town treasurer had on hand in the fund of this local improvement district the sum of $880.82, and there are no warrants outstanding against this fund prior, either in date or number, to

the warrants of this relator. The relator tendered its warrants to the town treasurer and demanded that he apply the money in his hands to the liquidation of these warrants, which was refused. Mrs. Armstrong was permitted to intervene upon the ground that she was the holder of warrants which would be affected by the action of the court in this action. The trial court made findings and conclusions and entered judgment in favor of respondents.

It is clear that only one of the sets of warrants for the eighty per cent estimate for March, amounting to $2,039.60, can be valid. It is well settled in this state that purchasers of municipal warrants take subject to all defenses that may be made against them, and if warrants are void they cannot be enforced, even in the hands of an otherwise innocent holder. *State ex rel. American Freehold-Land Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321. A warrant is not issued nor valid until delivered into the hands of the person authorized to receive it. *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534.

The questions to be determined are, (1) whether or not Armstrong had a prior assignment of the eighty per cent estimate for the month of March, under Christiansen's contract; and (2) whether or not the city's transaction with the bonding company through Aylmore bound it and all others subsequent thereto.

As to the first, we think there can be no question but that it was competently established that Armstrong had an assignment as early as February 23, 1915, and before any default on the part of Christiansen upon his contract, for all moneys due and to become due thereunder. The contract was a live contract until it was either performed, annulled, or abandoned. There is no showing that Christiansen had any intention, or that there were any indications in February that he

intended, to abandon the contract in March. He did not abandon it until March 29, about the end of the calendar month and near April first. It was, therefore, a valid contract up to that date, and any work which had been performed under it was for the benefit of the local improvement district of the city and, upon being completed, was fully performed. While the surety company had the right to take the place of the contractor, its principal, upon his default, nevertheless it was liable to the extent of its indemnity for all amounts obligated to be paid out under the terms of the contract, and whether in fulfilling the contract it lost any money over and above the total contract price is immaterial. Its actual total loss was much within its indemnity obligation. That Christiansen had the right, during the pendency of the contract, to dispose of the eighty per cent estimates each month, so long as he was in the performance of the contract, in any way he saw fit, even though he should squander it, leaving the surety at the mercy of the creditors, has been settled in our decisions in *Maryland Casualty Co. v. Washington Nat. Bank,* 92 Wash. 497, 159 Pac. 689; *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.,* 93 Wash. 635, 161 Pac. 473, and *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.,* 97 Wash. 211, 166 Pac. 620. The default of Christiansen before completion of the contract work could not relate back so as to create a breach of the contract during the prior period of performance. To so declare would enable the surety to substitute itself under the provisions of the bond and obtain an advantage through the wrong of its own principal.

There is no controversy but that Armstrong loaned the amount of money represented in his note and the assignment of the warrants by Christiansen during the life of the contract before any default; and whether

or not the funds went into the contract work in whole or in part is immaterial. It probably was material in the suit which Armstrong brought against Christiansen and the surety company, upon the question of whether the surety company had notice thereof and was liable to Armstrong, if Armstrong had a substitute claim in lieu of a lien against the bond, and the fund actually went into the construction. This he evidently did not, and could not, establish. But, if validly assigned to Armstrong for a consideration, and prior to any acquisition of such funds by any other person or any lien thereon, the assignment was valid under the foregoing decisions and gave Armstrong title to the fund thereby assigned and the warrants to be issued therefor. The surety company could acquire no better title to the funds and warrants to be issued therefor, by taking the place of the principal, than he himself had at the time, and the town could give no better title. The transaction whereby the mayor and clerk attempted to pay the fund by warrants to the surety company and the attempted ratification thereof by the council were, therefore, nugatory and void, and in nowise affected Armstrong's prior title.

The judgment below is affirmed.

MAIN, C. J., FULLERTON, MACKINTOSH, and MITCHELL, JJ., concur.

PARKER, J. (concurring)—I concur in the result reached by Judge Holcomb, but upon the ground that the judgment rendered in favor of Armstrong against the city, payable out of the improvement fund, became binding upon the surety company, it being a party to the action in which that judgment was rendered. It is true the surety company was not held personally liable in that action, but judgment was rendered therein against the fund to which the surety had a right to

look for its protection to the extent of any unpaid balances earned upon the contract by Christiansen. This was, in effect, an adjudication against the surety company and against its assignees, as well as against the city, that Armstrong's claim was a valid claim against the fund. It seems to me that the mere fact that the surety company was finally dismissed from that action as to its liability upon its bond does not change the fact that the judgment was in effect against the surety company and its assignees, in so far as Armstrong's right to have his claim paid out of the improvement fund is concerned.

TOLMAN, J., concurs with PARKER, J.

[No. 14720. Department Two. June 6, 1918.]

B. F. HALL, *Appellant*, v. THE STATE OF WASHINGTON, *Respondent*, FRANK GEARY, *Intervener*.[1]

REWARDS — PERSONS ENTITLED — COMPLIANCE WITH CONDITIONS. Where a reward is offered for the apprehension, arrest and conviction of an unknown offender, his apprehension and arrest is the principal factor, and if the person making the arrest upon suspicion aids in furnishing evidence which results in conviction, there is a substantial compliance with the conditions, and he is entitled to the whole reward, although he called in others who obtained evidence as to the offender's identification.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered September 4, 1917, upon findings in favor of the intervener, in an action to recover a reward, tried to the court. Affirmed.

Troy & Sturdevant and *Geo. F. Yantis*, for appellant.

W. D. Askren, for intervener.

[1]Reported in 173 Pac. 429.

MOUNT, J.—On June 3, 1915, one Fred Weiss was murdered by an unknown assailant in Thurston county. When the body was discovered, a watch which was on the person of the murdered man had been removed; his shoes, which were of a peculiar kind, had been removed from his feet; and a pair of shoes which did not belong to the murdered man were found in the vicinity. Subsequently, on June 15th, the governor of the state offered

"a reward of five hundred dollars ($500) for the apprehension, arrest and conviction of the said murderer or murderers of the said Fred Weiss."

Thereafter, on June 21st, one Frank Geary, a detective in the city of Tacoma, found one Joe Parrott, who was offering a watch for sale to a pawnbroker. Mr. Geary, upon inquiring where Mr. Parrott obtained the watch, was informed by Mr. Parrott that he had obtained the watch from a man at Elma, a town which is close to the place where Mr. Weiss was murdered. Mr. Geary immediately suspected Mr. Parrott as the murderer, arrested him without a warrant, took him to the jail in Tacoma, in Pierce county, and lodged him there. He called Mr. B. F. Hall, who was at that time the chief of police in the city of Olympia, by long distance telephone, and was informed that Mr. Hall was not in the office at the time. Mr. Geary stated over the telephone that he had arrested a man for the murder of Weiss, and gave a description of the watch which he had taken from him. On the next day, Mr. Hall went to Tacoma and concluded that the watch upon Mr. Parrott was not the watch which was taken from the body of the murdered man. Mr. Hall noticed the peculiarity of the shoes worn by Mr. Parrott, and the shoes were removed from his feet and by Mr. Hall brought to Olympia and identified by Mrs. Weiss and others as the

shoes of the murdered man. Thereafter Mr. Geary, the sheriff of Thurston county, and others, took Mr. Parrott to the vicinity where the murder was committed, and Mr. Parrott was there identified as having been in that vicinity on the day of the murder. The shoes which were found near the body of Mr. Weiss were also identified as the shoes that Mr. Parrott wore that day. Thereafter Mr. Parrott was brought to trial and was convicted of the murder of Mr. Weiss, largely upon circumstantial evidence furnished by Mr. Geary, Mr. Hall and other witnesses. Thereafter Mr. Hall brought this action against the state to recover the whole of the reward. Mr. Geary filed a complaint in intervention, also claiming the reward. Upon a trial of the case to the court without a jury, the trial court found that Mr. Parrott was arrested by Mr. Geary, that the trial resulted in a conviction of the accused man, and concluded therefrom that Mr. Geary was entitled to the whole reward, and entered judgment accordingly. Mr. Hall has appealed from that judgment.

It is conceded that the murderer, at the time of the arrest, was unknown. It is not disputed that Mr. Geary made the arrest upon suspicion that Mr. Parrott was the murderer. The appellant contends that, because the watch which was taken from the murderer at the time of his arrest was not Mr. Weiss's watch, the suspicions were unfounded, and that the shoes which were worn by the murderer were identified by Mr. Hall's efforts; and because this was a material part of the evidence upon which the conviction was had, Mr. Hall, therefore, was entitled to the reward, or at least that the reward should be apportioned between the claimants. As stated above, the offer of a reward made by the governor was "for the apprehension, arrest and conviction of the said murderer or murderers of the

said Fred Weiss." Mr. Hall did not make the arrest, because it is conclusively proven and conceded that the arrest was made by Mr. Geary. The apprehension or arrest of the murderer was the principal factor. The identification was a matter of evidence. If substantial evidence was procured by the arresting person, assisted by others, he was entitled to the whole reward. As stated in *Elkins v. Board of Com'rs of Wyandotte County,* 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662:

"Since it is not within the power of any citizen, literally, to do, by himself or his agents, the things specified in the statute and in the published offer, it is held that if he substantially accomplishes the full objects of the offer, aided by the officers of the law in the orderly performance of their official duties, he has met the conditions of the contract and earned the reward." (Syllabus.)

In *Marsh v. Wells Fargo & Co. Express,* 88 Kan. 538, 129 Pac. 168, 43 L. R. A. (N. S.) 133, it was said, in referring to the offer of reward:

"This language is quite as applicable to a conviction as to an arrest. Offers must in such cases be liberally construed in the sense in which they are ordinarily understood and acted upon and the purposes for which they are intended. A substantial compliance is sufficient."

It is clear in this case that Mr. Geary made the arrest. After the arrest, he called in Mr. Hall and other officers, and all of them succeeded in acquiring evidence which brought about a conviction of the accused, which resulted through the cooperation of Mr. Geary, Mr. Hall, the sheriff of Thurston county, the court and the jury; and it seems plain that, under these circumstances, where the person making the arrest of an un-

known offender aids in furnishing evidence which results in a conviction, he is entitled to the whole reward.

The judgment of the trial court is therefore affirmed.

MAIN, C. J., CHADWICK, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14796. Department Two. June 6, 1918.]

A. P. KANTERS, *Appellant*, v. FRANK KOTICK *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY — LIABILITY ON HUSBAND'S BOND. The husband's gratuitous bond is not a community debt where it was not given in a community enterprise.

PRINCIPAL AND SURETY—ACTION AGAINST SURETY—PARTIES. A surety in a joint and several bond may be sued separately from the principal, under Rem. Code, § 192, giving plaintiff the option to sue all or any of the persons severally liable upon the same obligation.

PRINCIPAL AND SURETY—ACTION ON BONDS—CONDITIONS PRECEDENT —TENDER OF PERFORMANCE. Tender of a conveyance is a condition precedent to an action upon a bond given to secure performance of the agreement of the vendees to discharge a mortgage as consideration for the conveyance, as the stipulations are mutual and concurrent.

SAME—LIABILITY OF SURETY—DEFENSE. A surety cannot be held liable upon a bond where the principal was not liable because the conditions for which it was given could not be performed.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered July 2, 1917, upon granting a nonsuit, dismissing an action on contract, tried to the court. Affirmed.

L. Y. DeVries and *John G. Barnes*, for appellant.

Troy & Sturdevant, for respondents.

HOLCOMB, J.—In the spring of 1913, one Williams, one Ray and others were desirous of procuring land

[1]Reported in 173 Pac. 329.

suitable for a cranberry plantation near Little Rock, Thurston county. Williams was selected to procure such land in his own name, with a view to having it transferred to a corporation when organized. Respondent Kotick gratuitously assisted Williams, who was a stranger at Little Rock, with the enterprise. One Keller was the owner of an eighty-acre tract of land containing some fourteen to twenty acres of marsh land, and held a school land lease from the state of forty acres of marsh land continuing the marsh of the eighty-acre tract. Williams and Kotick called at Keller's home and an agreement was entered into by the terms of which Keller was to assign the school land lease to Williams and the marsh land of the eighty-acre tract was to be surveyed and conveyed by a metes-and-bounds description. In consideration of the foregoing agreement Williams was to pay off, before or at maturity, October 3, 1915, the unpaid balance of a $1,400 mortgage against Keller's eighty-acre tract. To secure this payment of the mortgage, Williams, as principal, and Kotick, as surety, executed and delivered to Keller the bond sued on in this action. The assignment of the lease to the forty-acre school land tract seems to have been made immediately, but the conveyance of the marsh land of the eighty-acre tract was to be made as soon as surveyed. Thereafter, on or about July 2, 1913, Williams died and probate proceedings were had in Pacific county, beginning August 23, 1913, and closing in October, 1914, during which time more than one year had expired from the date of the first publication of notice to creditors, and no claim based upon the conditions of the bond had been presented to the administrator of the estate.

Sometime after Williams' death the land was surveyed, but not conveyed to him or his administrator. In October, 1913, notwithstanding their contract with

Williams, Keller and wife deeded the whole of the eighty acres to the appellant, who assumed and agreed to pay the $1,400 mortgage and the conditions of the bond, all without the knowledge and consent of respondents. Then again, notwithstanding the conveyance to appellant, Keller and wife deeded this land (which they had deeded to appellants and had contracted to Williams) to Black Lake Land Company, which last conveyance is conceded to be void. April 13, 1914, appellant conveyed the eighty-acre tract (excepting therefrom the marsh land by a metes-and-bounds description) to one Coleman, and in his deed covenanted and agreed to pay the $1,400 mortgage. The mortgage was not paid at maturity, and the property was sold to the holder of the mortgage under a decree of foreclosure. Appellant brought this action to recover from respondents, claiming that Kotick signed Williams' bond as surety and for the marital interest of the community.

Trial was had to the court, and at the close of plaintiff's case, defendants moved for a dismissal. The court reserved its ruling until the close of the trial, and entered a judgment of dismissal.

Appellant assigns as error: (1) The court erred in refusing to make the findings of fact requested by appellant. (2) The court erred in refusing to make the conclusions of law requested by appellant. (3) The court erred in making and entering the judgment of dismissal of this action and for costs against appellant. (4) The court erred in making finding of fact number 5. We will first consider assignment No. 3, for, if appellant has failed to prove a cause of action, the other assignments will avail him nothing.

Appellant does not now strenuously insist that the marital community is liable, and we cannot see how it could be held that the gratuitous signing by the hus-

band as a surety on a bond, it not being a community enterprise, would bind the community.

The next contention is that the surety may be sued irrespective of the principal. We will concede the rule to be, under Rem. Code, § 192, that the surety may be sued and held liable jointly with and separately from the principal. In *Pacific Bridge Co. v. United States Fidelity & Guaranty Co.*, 33 Wash. 47, 73 Pac. 772, it was said:

"But this was a joint and several obligation, and the statute provides that persons severally liable upon the same obligation or instrument may, all or any of them, be included in the same action at the option of the plaintiff."

The next question is, Can the principal and surety on a bond of this kind be held liable when the conditions of the obligee for which the bond was given have not been executed or cannot be performed. The material portion of the bond in question is:

"The conditions of the above obligation are such that, whereas, the said parties of the second part have entered into a contract by which it is agreed that the said parties of the second part shall assign to the said J. H. Williams a certain lease owned and held by the said parties of the second part, of certain school lands, to wit: [description omitted] and further that the parties of the second part will sell and convey unto the said J. H. Williams, by good and sufficient deed of conveyance, twenty acres, more or less, of bottom lands situated upon the east half of the northeast quarter of section 35, township 17 north, of range 3 west, W. M., being all the bottom lands thereon.

"It being intended by said contract that said conveyance of said bottom lands shall be made as soon as the precise amount, and the metes and bounds of said lands are definitely ascertained by a survey hereafter to be made by J. J. Keller and J. H. Williams, in which said contract it is agreed that the consideration given to the parties of the second part, for the assignment

aforesaid, and the conveyance aforesaid, shall be the assuming, paying, discharging and holding harmless therefrom the said parties of the second part, a mortgage made by the said parties of the second part upon the east half of the northeast quarter of section 35, township 17 north, of range 3 west, W. M., when same shall become due and payable, and the payment to the parties of the second part of the sum of one dollar, which has already been paid. Said mortgage was executed as aforesaid to Stephen and Marcia Osborn, and becomes due Oct. 3, 1915, and recorded in volume 7 of Mortgages, page 145."

The instrument shows that the obligees are to assign the lease and to convey the bottom lands, and this obligation is not severable. They are to do both in order to ripen an action against either or both the principal and the surety on the bond. Can it be said that appellant has a cause of action when there is an obligation, untendered and unperformed on his part, that is precedent to, or at least concurrent with, the obligation which he seeks to enforce?

In *Tacoma Water Supply Co. v. Dumermuth,* 51 Wash. 609, 99 Pac. 741, the court said:

"After the respondents acquired their deed from the state, their obligation to convey and the obligation on the part of the purchaser to pay the purchase price became *mutual, concurrent* and *dependent,* and *neither party could thereafter put the other in default or claim a forfeiture without first tendering performance on his part;* and this, whether the contract contained a forfeiture clause or not."

See, also, *Mudgett v. Clay,* 5 Wash. 103, 31 Pac. 424; *Underwood v. Tew,* 7 Wash. 297, 34 Pac. 1100; *Stein v. Waddell,* 37 Wash. 634, 80 Pac. 184; *Katz v. Hathaway,* 66 Wash. 355, 119 Pac. 804.

Did appellant prove that the conditions for which the bond was given were performed or tendered, within a reasonable time or at all, to the proper person who

was entitled to accept them? The evidence fails so to show. The principal of the bond surely could not be held liable if the conditions for which it was given were not performed, and undoubtedly the surety cannot be held where his principal could not.

We think the trial court properly dismissed the action for failure of proof. The judgment is affirmed.

MAIN, C. J., MOUNT, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14826. Department Two. June 6, 1918.]

DAVID ROBINSON *et al., Appellants,* v. C. R. WILSON *et al., Respondents.*[1]

LANDLORD AND TENANT — CONDITION OF PREMISES — LIABILITY OF LANDLORD. Under a lease of a hotel building to be constructed according to plans and specifications, the maxim of *caveat emptor* applies, and the tenant cannot recover damages and loss of rental value through defects in the heating plant and seepage of water in the basement walls, where the building was constructed according to the plans and specifications.

SAME. Inadequacy of the plans would not constitute a breach of the lease, nor would inadequacy of the heating plant or seepage in the walls be evidence of breach.

SAME—LEASE—USE OF PREMISES—GUARANTY OF FITNESS. Under a lease of a hotel building containing no restrictions as to its use, a guaranty of the fitness of the building for hotel purposes cannot be implied.

SAME—REPAIRS—PERFORMANCE BY TENANT—WAIVER. The voluntary act of a landlord in making repairs to a heating plant does not waive his right to a strict performance of the lease by the tenant.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered July 9, 1917, upon findings in favor of the defendants, in an action for rent, tried to the court. Reversed.

[1]Reported in 173 Pac. 331.

Forney & Ponder, for appellants.

C. D. Cunningham and *W. H. Abel,* for respondents.

CHADWICK, J.—On June 20, 1914, appellants and respondents Samuel A. Agnew and C. R. Wilson entered into a contract of lease whereby appellants leased to respondents certain property in the city of Centralia. A building was in course of construction thereon. The parts of the lease material to this inquiry are as follows:

"For the term of five (5) years the said term to commence upon lessors giving to lessees notice in writing of the completion of the building now under course of construction on said premises, the said building to be three stories high and in accordance with the plans and specifications, except as to the first floor which is to be subdivided in accordance with the wishes of lessees, and said building to be completed on or about October 1st, 1914, and the said five years' term to commence five days after the giving of such notice, at the monthly rent or sum of four hundred ($400) dollars per month for the first twelve months of said lease, and the sum of four hundred and twenty-five ($425) dollars per month for the succeeding forty-eight months of said term, the said rentals to be paid monthly in advance, the first month's payment to be paid on the execution hereof, and the other monthly rentals to be paid monthly in advance as of the time as set for the commencing as this lease by the notice as aforementioned, during the full term hereof."

The building was completed in November, 1914, and on the 9th day of that month defendants went into possession and paid their rent up to and including the 15th day of February, 1916. On February 24, 1916, defendants notified plaintiffs that they would refuse thereafter to pay rent because of the neglect and refusal of appellants to put the building in a tenantable condition, in that they had failed to provide sufficient heating facilities, and that, as a result thereof, respondents

had been compelled to turn away guests; that, when the back rooms were properly heated, the front rooms were too cold for comfort, and when the front rooms were properly heated, the back rooms were uninhabitable because of the heat. A further delinquency was alleged in that appellants had failed to provide proper sample rooms. It seems that the sample rooms were in the basement and that water seeped through the walls and floor during the rainy seasons. In their notice of refusal to pay additional rent, respondents claimed damages for the expired term of $3,000, and for the future term of $12,000, and "you are therefore advised, as before stated in this letter, that the Wilson Hotel Company will no longer pay rent upon said premises until such conditions are eradicated, or satisfactory arrangement made for the settlement of these demands." On the 13th day of March, appellant gave respondents notice to pay rent, and on the 16th brought this action to recover the rent due in March and April, or $850.

Respondents answered, admitting the lease, and alleged affirmatively that the building was built to be used as a hotel and that it had not been constructed according to plans and specifications, in that the heating plant had not as much radiation as called for and that the valves were improperly installed, and that the building was not constructed of the best materials, and that the workmanship was not of the "best manner" employed by skilled mechanics. They alleged that the rental value was not to exceed $200 per month, and prayed for the difference between that sum and the sum of $400 and $425 per month which had been paid under the lease, and for damages for the remainder of the term in a like sum.

They also prayed for damages in the sum of $500 on account of the careless and negligent manner in

which appellants had attempted to repair the building. This item was in no way sustained. Appellants replied, denying generally. The testimony going to the condition of the heating plant and its workings is in sharp conflict. That there was a seepage through the walls and floor of the basement and to some extent through the south wall was established.

The court found that the building had not been built according to the plans and specifications in the particulars mentioned; that respondents had suffered a damage to the extent of $100 per month; figured the reasonable rental value at $325 per month; allowed respondents $2,000 less $850, the unpaid rent, and entered a judgment for the difference, being $1,150 with costs.

Without taking issue with the theory of the law entertained by the trial judge in the assessment of damages, and granting that the heating plant did not meet the requirements of the business and that water seeped into the basement and through the south walls, we are unable to follow him in his findings of fact.

The right of respondents to recover rests primarily in contract, and they are under a burden to show a breach of contract. The lease was executed long before the building was occupied and was drawn with reference to certain plans and specifications. If the plans were then inadequate, the infirmity would fall equally upon the contracting parties and there could be no recovery. For it is known of all men that "plans and specifications" do not insure habitable buildings. Some architects are artists, some have constructive genius, and some can draw "plans and specifications."

Likewise, if the building was not completed according to the plans and specifications, it was a fact susceptible of proof, and of which the proof of the inadequacy of the heating plant and the seepage in the walls

would not be evidence—certainly not when standing alone and unsupported by any testimony which would tend in the slightest degree to prove that the plans and specifications had been departed from. The only testimony found in the record in which plans and specifications are mentioned is that of a witness who says:

"The basement could have been constructed water tight, and if the mixtures called for in the plans and specifications had been properly placed the basement would not have leaked. The same is true of the south wall of the building. If this had been properly constructed it would not leak . . . The walls of the basement are not of the best possible construction as called for in the plans and specifications."

But he does not assume to say what the plans and specifications required.

Witnesses testified that the rental value of a building used for hotel purposes and heated as this one was and with seepage in the basement and through the south wall would be from $100 to $250 per month, but it is not shown that the hotel was not as adequately patronized as a hotel in a community the size of Centralia would have been patronized if conditions had been otherwise. It is true that one of the respondents testified that a number of traveling men had quit the hotel, but how many or for how long or whether it resulted in a money loss is not made clear. Many traveling men testified to their satisfaction with the hotel, two of them saying it was a favorite resort of traveling men, and one of them that it was often full to overflowing.

Both the contractor and the heating contractor testified that the building was built and the heat installed strictly in accord with the plans and specifications, and their testimony is not challenged. The building was accepted by the architect in charge, which is some evi-

dence that it was completed in accordance with the plans and specifications.

We think it will not be questioned that a landlord is not a guarantor of the fitness of a building for the purpose for which it is leased unless he binds himself by written contract. Nor will the fact that he knows the use to which it is to be put hold him to such liability where, as in this case, no restrictions are put upon the use of the building in the written lease.

"It is agreed by the authorities at the present time that, as a general rule, there is no obligation on the part of the lessor to see that the premises are, at the time of the demise, in a condition of fitness for use for the purpose for which the lessee may propose to use them. A lessee, like the purchaser of a thing already in existence, is presumed to take only after examination. The maxim *caveat emptor* applies, and if he desires to protect himself in this regard he must exact of the lessor an express stipulation as to the condition of the premises." Tiffany, Landlord and Tenant, § 86.

"As the landlord is under no obligation to the lessee, as regards the condition of the premises, or its fitness for the lessee's purpose, at the time of the demise, so he is under no obligation to the lessee, or to the latter's assignee, to keep the premises during the tenancy in a condition satisfactory to the latter. Accordingly, a landlord is not bound, as a general rule, in the absence of special stipulation, to make repairs or improvements on the premises in order to render them safe or fit them for the tenant's use. And as a result of this principle, the tenant cannot assert any claim against the landlord on account of injury to himself or his property owing to defects in the premises arising since the demise . . . Even though the premises are leased for a particular purpose, and any other use thereof is prohibited, the landlord is, it has been decided, under no obligation to keep them fit for such use." Id., § 87.

See, also, Taylor, Landlord and Tenant, § 327 *et seq.;* 24 Cyc. 1081.

And this rule is not for the benefit of the one or the other, but is the corollary of the rule that, where there is a written contract of lease general in its terms, a tenant cannot be bound by an oral declaration or general understanding that it was to be used for a particular purpose. 16 R. C. L. 729.

Respondents seek to sustain their recovery by asserting a promise on the part of the appellants to repair the heating plant, and by proof of the fact that the heating plant was changed at their request during the time they occupied the premises. It is urged that these things operated as a waiver and rendered appellants liable as if on a covenant to repair. A voluntary act of a landlord who makes repairs at the suggestion of his tenant but who is under no obligation to repair will not be held to be a waiver of the right to a strict performanee. *Williamson v. Miller,* 55 Iowa 86, 7 N. W. 416; *McClure v. Little,* 19 L. T. 287.

The rule that exempts the landlord from the penalty of an involuntary waiver is the same rule that exempts the tenant from a waiver of the landlord's covenant to make repairs by the payment of rent. *Hardman Estate v. McNair,* 61 Wash. 74, 111 Pac. 1059; *Shigeta v. Gaffney Inv. Co.,* 72 Wash. 221, 130 Pac. 88; *Thomson Estate v. Washington Investment Co.,* 84 Wash. 326, 146 Pac. 617, do not militate against our holding. The first case asserts the general rule. The written lease fixed the use and it was provided that the building should not be used for any other purpose.

In the second case, the landlord entered in a contract to build a building according to certain plans and specifications which had been agreed upon between the parties. The lease provided that the lessee should take possession when the building was completed and thereafter the lessee would keep it in repair. When notice

was given that the building was ready for occupancy it was in a leaky condition and the lessee refused to take possession. The landlord thereupon, as a condition of present occupancy, promised to remedy the defect. We held that an occupancy under a concurrent promise made by the landlord under such circumstances was not a waiver of the lessee's right to insist upon full performance by the landlord. The case is distinguished upon its facts. The third case holds that the payment of rent is not a waiver of the tenant's right to recover for necessary improvements where the burdens of repair were on the landlord.

The trouble in this case is that we are asked to make a contract grounded in the equities incident to subsequent events, where the parties, who might have foreseen every incident and circumstances now relied on, failed to guard against them in their written contract. And this is where the trial judge fell into error. He says:

"I think, however, that it cannot be successfully disputed that in the extreme wet months of the year there are defects in the building and heating plant, which are not within the contemplation of the lease, and which resulted in a loss to the defendants."

It may at times result in inequity, but the law is so written that a landlord is not bound beyond the terms of his lease, and that parties who enter written contracts are presumed to have in contemplation probable consequence and the established principles of the law.

Written contracts would be of little consequence in the business world if they were to be so overcome, or, if working to the disadvantage of one who has agreed to pay a certain price, his express contract could be turned, over the protest of his adversary, into a *quantum valebat.*

Reversed, and remanded with instructions to enter a judgment in favor of appellants for $850 and costs.

MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14777. Department Two. June 7, 1918.]

CHESTER RAINEY, *Respondent*, v. E. N. PEARCE *et al.*, *Appellants*.[1]

APPEAL—REVIEW—HARMLESS ERROR. In an action tried to the court, error in admitting evidence is harmless where it is apparent that the evidence was disregarded.

WORK AND LABOR—SALARY—QUANTUM MERUIT. Where plaintiff's employment was admitted, and the evidence showed that no specific salary was agreed upon, the plaintiff was entitled to recover upon *quantum meruit*.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered October 31, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Gus L. Thacker, for appellants.

C. D. Cunningham, for respondent.

MOUNT, J.—This action was brought to recover for labor performed by the plaintiff for the defendants between the 1st day of April, 1916, and the 15th day of August of the same year. In the complaint it was alleged that the defendants were engaged in the business of manufacturing and selling inventions; that plaintiff was employed as manager of the business; that his services were reasonably worth the sum of $275 per month, which defendants agreed to pay. Plaintiff also

[1]Reported in 173 Pac. 328.

alleged that he had expended for the use and benefit of the defendants $250, and prayed for judgment in the sum of $1,650. The answer of the defendants, after denying that they had employed the plaintiff at any agreed salary, alleged affirmatively that the plaintiff agreed to accept as full compensation for his services ten per cent of the profits derived from the manufacture and sale of a pneumatic shock absorber, provided he continued as general manager of the business; that plaintiff, on or about the 15th day of August, 1916, abandoned his contract, to the damage of the defendants in the sum of $40 per month. As an affirmative defense, they alleged counterclaims for material and supplies and for the use of an automobile furnished the plaintiff, and asked for a judgment against the plaintiff in the sum of $701.52. These allegations were denied by reply. Upon these issues the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the sum of $825.60. The defendants have appealed from that judgment.

They make two assignments of error to the effect: First, that the court erred in admitting expert evidence as to the qualifications and reasonable value of the services of the respondent; second, in entering judgment in favor of the respondent and refusing to find the facts proposed by the appellants.

Upon the first point it is argued that the court erred in receiving the evidence of certain witnesses who were called to testify as to the value of the respondent's services, because these witnesses were not qualified to testify to such services. These witnesses testified that such services were worth from $250 to $300 per month. Whether this evidence was admissible because the witnesses were not qualified to testify, we think it is not necessary to decide, because the court, upon other evi-

dence, concluded that the reasonable value of the services was $150 per month, and made a finding to that effect; so it is apparent that the court disregarded the evidence of the experts as to the value of the services, and therefore, if it was error to admit this testimony, no harm was done to the appellants.

Upon the next assignment of error it is argued that the court erred in allowing the respondent to recover upon a *quantum meruit*, because the evidence shows there was an agreement between the respondent and the appellants whereby the respondent agreed to become manager of the business and receive ten per cent of the profits of the business as his compensation. There was direct conflict in the evidence as to what the agreement was. It was conceded that the respondent was employed by the appellants as general manager of the business. The respondent testified that the agreement was that he should have a "good salary," and that, when he asked the appellants what they meant by a good salary, they in turn asked him what he had been receiving, and he replied "$250 to $300 a month." They thereupon said to him that, if he made good in the service, that was nothing at all; that they would not object to paying $500 a month as soon as the business was organized. The court evidently believed this testimony and concluded that there was no specific salary agreed upon, and that the respondent was therefore entitled to the reasonable value of his services, which was found to be $150 per month. The respondent disputed the evidence of the appellants to the effect that he agreed that his salary should be ten per cent of the profits of the business. Whether there was a specific contract for services was plainly a question for the court upon contradictory evidence, and we are satisfied that the trial court was justified in finding for the respondent upon that point.

We find no reversible error in the record, and the judgment is therefore affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14585. Department One. June 15, 1918.]

S. V. ROBBINS *et al.*, *Respondents*, v. MILWAUKEE MECHANICS INSURANCE COMPANY, *Appellant*.[1]

SALES—CONDITIONAL SALES—ASSIGNMENT. An absolute bill of sale by the vendee in a conditional sales contract conveys only his interest, and amounts to no more than an assignment of the conditional sales contract.

INSURANCE—AVOIDANCE OF POLICY—TITLE—MISREPRESENTATIONS—"INTENT TO DECEIVE." Under Rem. Code, § 6059-34, providing that misrepresentations or warranties shall not avoid a policy of insurance unless made with intent to deceive, a fire policy on pool tables issued to the vendee in a conditional sales contract is not defeated by the insured's want of title, where he informed the insurance agent that he had not paid for the tables, the conditional sales contract was on record, and the agent was put on inquiry as to the state of the legal title.

SAME—INSURABLE INTEREST—TITLE—CONDITIONAL SALE—RELIEF IN EQUITY. Where a conditional sales contract required the vendee to insure the property for the benefit of the vendor, the policy inures to the benefit of the vendor, and the insurance company, with notice or put on inquiry, cannot in equity complain of reformation of the policy or decree protecting the vendor to the extent of the unpaid purchase price.

SAME—ACTION FOR LOSS—PROOFS OF LOSS—WAIVER. The question of waiver of proofs of loss is a question for the jury, where it appears that the insured furnished the adjuster all itemized statements and information desired by the adjuster and was misled into believing that nothing further was necessary.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 23, 1917, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

[1]Reported in 173 Pac. 634.

Kerr & McCord, for appellant.

James B. Murphy, for respondents.

TOLMAN, J.—On November 11, 1915, Viola Robbins, one of the respondents, was the owner of two pool tables and equipment pertaining thereto, and on that day, through her husband, S. V. Robbins, the other respondent, she sold the same to L. N. Kempf, and took a conditional sale agreement in the usual form, reserving title in herself and providing that, upon the payment of the purchase price of $300 in installments as therein set forth, the title should vest in the vendee. In the contract was the following:

"And said vendee further agrees to keep said property insured in a sufficient amount in favor of said vendor to cover her interest at all times before the vesting of said title in said vendee by the making of said payments as aforesaid."

This conditional sale agreement was duly filed for record on the day of its execution. Shortly afterwards, and when only two or three small payments had been made upon the conditional sale contract, L. N. Kempf made a bill of sale of all of the property in his place of business, including the two pool tables and equipment now under consideration, to his father, Casper Kempf. L. N. Kempf, as agent of Casper Kempf, remained in possession at all times until the property was destroyed by fire as hereinafter mentioned. Shortly after the conveyance to Casper Kempf, L. N. Kempf, as his agent, procured a policy of insurance against loss by fire upon all of the property included in the bill of sale to Casper Kempf, in which the pool tables were specifically mentioned, and it was provided that there should be no recovery greater than $150 for each pool table under the policy. The premium was paid by checks signed "Casper Kempf by L. N. Kempf,

Agent," prior to the fire, and on January 26, 1916, the premises and all of the insured property, including the pool tables, were destroyed by fire.

L. N. Kempf, as agent for Casper Kempf, immediately began to take steps to claim loss under the policy of insurance, discussed the matter with the local agent of the company, whose place of business was across the street from the premises where the fire occurred, and the company sent its adjuster, who conferred with L. N. Kempf. Itemized statements were made up and furnished to the adjuster, which included the pool tables in question. The adjuster appears to have made inquiries of L. N. Kempf, and perhaps others, as to the value, and to have noted on these statements figures tending to indicate that he fixed the value of the tables at $300. And there is considerable testimony in the case to the effect that the adjuster was furnished all of the evidence with reference to the property destroyed and the value thereof which he required; that he was repeatedly asked if he required any further proof and made no demands therefor, although it is fair to state that this testimony is denied by the adjuster. In any event, the insurance money was not paid, and the respondent Viola Robbins, evidently fearing that the money might be paid by the insurance company to the Kempfs, or one of them, brought this action, in which both L. N. Kempf and Casper Kempf were made parties defendant, as well as the insurance company, seeking to enjoin the insurance company from paying the money to the Kempfs, or either of them, and praying that the insurance money be paid to her as her interest might appear.

Issues were raised by denials and affirmative defenses, and upon the trial the court below determined the issues in favor of the respondent, entering a judgment in her favor against L. N. Kempf and the insur-

ance company for the sum of $298.35, and enjoining the insurance company from paying any portion of the amount to L. N. Kempf or Casper Kempf. From this judgment, an appeal is prosecuted by the insurance company, which raises two principal contentions in this court: First, that the policy of insurance, having been written in the name of Casper Kempf as the insured, and he having no title to the pool tables, the policy was void, or at least that the respondent cannot recover thereon; and second, it is claimed that there was a failure to furnish proof of loss within sixty days in accordance with the terms of the policy, which policy was in the standard form, and that therefore no liability exists.

No doubt the legal title to the property in question was at all times in the respondent, and so remained until it was destroyed by fire. The conditional bill of sale placed L. N. Kempf in the lawful possession with the right to acquire title, and charged with all duties which the conditional bill of sale placed upon him. The bill of sale from L. N. Kempf to Casper Kempf, while purporting to be an absolute conveyance, could only operate to convey whatever interest L. N. Kempf had in the property, and hence, in law, amounted to no more than an assignment of his interest or rights under the conditional sale agreement, and at most was equivalent to an assignment of the contract, and Casper Kempf took the property subject to all of the terms of the conditional sale agreement, including the covenant to insure.

Casper Kempf appears never to have been in possession of the property, except through L. N. Kempf, the vendee in the conditional sale contract, whose possession of the property remained undisturbed from the time of making the contract until the destruction of the property by fire. He was in possession first as

vendee under the contract, and thereafter, if the bill of sale to his father is in fact anything more than colorable, as agent for Casper Kempf. There being no notice to the respondent of the purported sale to Casper Kempf, there was no change of possession as to her, and nothing to give her notice of such change.

The appellants' contention that there was a breach of the warranty of title under the policy appears to be disposed of by the statute, Laws of 1915, page 703, which provides:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation or warranty is made with the intent to deceive." Rem. Code, § 6059-34.

From all the evidence the trial court found that L. N. Kempf, in procuring the insurance, disclosed that he had not paid for the pool tables, and that he concealed none of the facts. It is apparent from the testimony that, had the agent followed up the inquiry, as he might have done, he could have ascertained the true facts as to the title to the property. There appears to be ample evidence to support the findings of the trial court in this respect, and we cannot find, from a careful examination of the record and a reading of the statement of facts, that the evidence preponderates against such findings.

It is argued, however, that there was no contractual relation between the respondent and the insurance company, and that the respondent has no interest in the policy and cannot recover thereunder. That the conditional bill of sale was of record is undisputed, and there is evidence tending to show that Mr. Goff, the agent who wrote the policy, had, or might have ob-

tained, knowledge of the true condition. However that may be, the insurance company appears to have received its premium, the property was destroyed, and it ought not, in good conscience, to avoid paying the loss on a mere technicality. The legal title to the property was in the respondent. L. N. Kempf, as vendee, had contracted to keep it insured to at least the extent of the unpaid purchase price, and his interest had passed to Casper Kempf with full knowledge of such condition. The property being destroyed, the insurance money stands in lieu thereof, and it would seem equitable, under these conditions, for the court, if necessary, to order a reformation of the insurance policy so that it should protect the interest of the true owner of the property.

This court has recognized this doctrine in *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643. True, in that case, it is said that the agent had actual knowledge of the ownership of the property. But it is not perceived that there should be any difference in applying the rule where the agent had notice and means of knowledge.

It is also a familiar doctrine that a policy of insurance inures to the benefit of the mortgagee, whether the policy, by its terms, is so payable or not, if the mortgage, by its terms, requires the mortgagor to insure for the benefit of the mortgagee. *Johnson v. Northern Minnesota Land & Investment Co.*, 168 Iowa 340, 150 N. W. 596; *Swearingen v. Hartford Fire Ins. Co.*, 56 S. C. 355, 34 S. E. 449; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137; *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 13 N. E. 683, 2 Am. St. 219. And it is difficult to see any reason why the insurance company should complain because the court below in effect found that the insurance money, which

stood in the place of the property destroyed, in equity belonged to the owner of the property to the extent of the unpaid purchase price which was owing her.

Appellant's contention that the terms of the policy were not complied with because no form of proof of loss was made within sixty days, and that such proof of loss was not waived, so far as it is a question of law, seems to have been decided against it by this court in the case of *Ramat v. California Ins. Co.*, 95 Wash. 571, 164 Pac. 219, where, upon a somewhat similar statement of facts, it was held that the question of the waiver of such proofs was a fact to be submitted to the jury. And also in the more recent case of *Boskovich v. Union Assurance Society*, 98 Wash. 579, 168 Pac. 166, where the court, after careful consideration and discussion, adopted and followed the rule previously announced in the case last cited. Since the question has been fully considered in both of these recent cases, it seems unnecessary to again enter into a discussion of it.

Upon the question of fact as to the waiver, the trial court found in favor of the respondent. It had the benefit of seeing the witnesses and hearing them testify in person. We cannot find that the evidence preponderates against the trial court's decision, and we are therefore satisfied to affirm it.

The judgment will be affirmed.

MAIN, C. J., MITCHELL, FULLERTON, and PARKER, JJ., concur.

[No. 14661. Department One. June 15, 1918.]

A. G. DENBIGH, *Appellant*, v. FIRST NATIONAL BANK OF SEATTLE, *Respondent*.[1]

BANKS AND BANKING—PAYMENT OF FORGED CHECK—EVIDENCE—SUFFICIENCY. In a depositor's action to recover from a bank the amount paid out on a forged check, there is sufficient evidence of the forgery, where plaintiff testified that he did not sign the check, which disappeared when, during his absence, it came into the hands of his bookkeeper who absconded, having also forged another check about the same time.

SAME—PAYMENT OF FORGED CHECK—LIABILITY—DEFENSES—NEGLIGENCE OF DEPOSITOR. A bank has no right to charge against the depositor the amount paid out on a forged check, unless the depositor is estopped by his course of conduct, negligence or laches; and negligence is not shown by the employment of a bookkeeper who was recommended by a reputable firm, without notice of a previous criminal charge against him under an assumed name.

SAME—PAYMENT OF FORGED CHECK—NOTICE BY DEPOSITOR—LIMITATIONS. In view of Rem. Code, § 3363, limiting a bank's liability to depositors on forged checks, unless notice be given the bank within sixty days, a shorter limitation by contract will not be assumed from the fact of printed notice on the pass book requiring notice to be given within ten days, where the same was not specially called to the depositor's attention.

SAME—PAYMENT OF FORGED CHECK—NOTICE BY DEPOSITOR—DILIGENCE. Diligence in giving notice of the payment of a forged check is shown where it appears that the depositor was absent when his bookkeeper, who committed the forgery, receipted for the vouchers, that he employed another bookkeeper within five days, and discovered the forgery within eight days, after his return and immediately gave notice thereof to the bank.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 7, 1917, upon findings in favor of the defendant, in an action to recover money paid on a forged check, tried to the court. Reversed.

[1]Reported in 174 Pac. 475.

Herr, Bayley & Croson, for appellant.

Hughes, McMicken, Ramsey & Rupp, for respondent.

TOLMAN, J.—Appellant brought this action to recover $3,500 from the respondent, which amount he alleges was wrongfully paid out by the respondent on a forged check and charged to his account.

The complaint is in the usual form, setting up a deposit by the appellant with the respondent bank; that the sum of $3,500 remained so on deposit to his credit; that he drew his check therefor and presented the same and demanded payment, which payment was refused; and demands judgment for the amount thereof.

The answer denies that the appellant then had on deposit $3,500, or any other sum, and affirmatively sets up, first, that the pass book which was furnished by the respondent to the appellant contained on the outside of its front cover the following:

FIRST NATIONAL BANK
Seattle - - - Wash.
in account with
A G. Denbigh, Purchasing Department
NOTICE

Always bring this book with your deposits. See that the entries agree with your tickets. Please call for your statement on the first of each month, and report difference, if any, at once.

The bank in receiving out-of-town checks and other collections, acts only as your agent and does not assume any responsibility beyond due diligence on its part, the same as on its own paper.

That, at the close of business each month, the respondent, in accordance with the general banking custom, prepared for each of its customers a monthly statement showing the state of the account with such customer, the dates and amounts of checks drawn against the customer's account and cashed by the bank during the month, the amount deposited to the credit of the customer, and the balance standing to the credit of the customer at the close of business for such month;

that each of such statements contained upon its face, in plain type, the following:

"If no error is reported in ten days the account will be considered correct."

The affirmative answer further alleges, that the appellant maintained in his employ as bookkeeper one S. Boyd; that Boyd, on or about the 10th day of January, 1917, called at the bank for the December statement of appellant's account and the canceled checks for that month, and receipted for the same; that thereafter, on February 2, 1917, Boyd called for appellant's January statement of account and canceled checks for the month of January, received the same, and gave the following receipt:

> Received of the First National Bank, Seattle, Wash., Statement of vouchers of my (our) account. I (we) agree to examine the statement carefully and if not correct, to give notice and make all reclamations within ten days.
>
> Date balanced, Jan. 31, 1917.
>
> Vouchers returned, 24.
>
> Date received, Feb. 2, 1917.
>
> Denbigh P. Dept. per S. Boyd.

That no objection or complaint was made by the appellant to the correctness of said bank statement, or the genuineness of the canceled checks returned, within ten days after the receipt thereof, or at all, until on or about February 20, 1917; that the January statement so delivered showed the payment of the check now in controversy, and left a balance standing to the credit of the appellant in the sum of $919.38, which sum had been withdrawn prior to the commencement of this action.

The evidence is not conflicting, the only issue being the relative weight to be given to the several parts and the conclusions to be drawn therefrom.

The trial court made findings of fact and conclusions of law which, so far as now material to the matter in

controversy, were in effect: That the appellant opened the account with the respondent about December 15, 1916, under the name and style of "A. G. Denbigh Purchasing Dept." with the authorized signature of Alexander Denbigh, who was then in charge of the appellant's business in Seattle, supplying the respondent with the signature upon the usual identification card; that Alexander Denbigh received from the bank a pass book containing, among other things, the notice: "Please call for your statement on the 1st of each month and report differences, if any, at once;" that the appellant had in his employ a bookkeeper, one S. Boyd, who had charge of appellant's books and accounts, including his pass book, and was from time to time authorized by the appellant to present checks drawn on said deposit account with the respondent and receive the cash thereon; that the appellant had employed Boyd on the recommendation of the Seattle Hardware Company; that, shortly after the first day of January, 1917, Boyd presented the appellant's pass book to the respondent bank and received the canceled vouchers and statement of appellant's account to and including December 31, 1916, and signed a receipt therefor, which had on its face in plain type the following: "If no error is reported in ten days the account will be considered correct;" that, on January 10, 1917, Boyd presented to the respondent's exchange teller a check numbered 30, for $3,500, purporting to be signed by the appellant's authorized signature, namely, "A. G. Denbigh Purchasing Dept., by Alexander Denbigh;" that the teller having, in the exercise of due care, examined said signature and compared the same with the identification card of the appellant's authorized signature previously filed with the bank, and having determined to his satisfaction that the signature on the check was appellant's true, genuine, and authorized

signature, and that the amount of the check was on deposit to the appellant's credit, the respondent thereupon received the check and paid it by delivering to Boyd its cashier's check to the order of A. G. Spaulding in the sum of $3,500, which cashier's check was subsequently paid and satisfied by the respondent in the ordinary and regular course of business.

The trial court further found, that Boyd again presented the appellant's pass book to the respondent bank on or about the second day of February, 1917, and received and receipted for the canceled checks and statement of appellant's account for the month of January; that Alexander Denbigh was absent from his office and from the city of Seattle from about January 19 until February 12 or 13, 1917; that Boyd left the employ of the appellant on or about February 12, 1917, and absconded from the city of Seattle on or before February 15, 1917; that, prior thereto, while in the appellant's employ, and without his actual knowledge, Boyd had been under arrest in King county for the commission of a crime, upon proceedings instituted by the prosecuting attorney of King county, and upon arraignment had been released upon bond, and had thereafter, in the month of January, 1917, deposited in court in said criminal proceeding an additional cash bond of $1,000 for his appearance; that, immediately upon the return of Alexander Denbigh to Seattle, he employed a bookkeeper to take charge of the appellant's books, and that such bookkeeper discovered a discrepancy of $3,500 between the bank balance as shown by the pass book and the balance as shown by the stubs in the appellant's check book, and called the same to the appellant's attention on or about February 20, 1917, whereupon the appellant immediately notified the respondent thereof.

It will be noted that the trial court has failed to find whether or not the check here in controversy was in fact a forged instrument.

The respondent contends that the burden is upon the appellant to show that the signature to the check in question was a forgery. This is no doubt the law, and we think the appellant did so show by a preponderance of the evidence. The testimony of Alexander Denbigh as to the manner and method of signing checks only while attached and in place in the check book, properly filled out, both as to the stub and the check; the check book itself, which shows no stub numbered 30 to correspond with the check in question; the appellant's complete denial of the signing of such a check; his denial of acquaintance with, knowledge of, or business relations with Spaulding, who received the proceeds, and the significant fact of the disappearance of the check itself when it came into the hands of Boyd, present as complete a case as the circumstances permit; and the persuasive evidence of the forging of another check or checks at about the same time by Boyd on his employer's account in the Bank of California is not needed to enable this court to find that the signature to the $3,500 check involved here was in fact a forgery, and that the forgery was committed by Boyd, the bookkeeper who received the monthly statements of appellant from the respondent on February 2, 1917. Nor is the convincing weight of this proof in any manner overcome or lessened by respondent's suggestion that checks numbered 28, 29, 31 and 32, all shown by the stubs in the check book and bearing the same date as the forged instrument, which is numbered 30, were probably all signed at the same time, and that Boyd might have filled in the body of the check numbered 30, inserted it among the other four checks just referred to bearing the same date, and procured the ap-

pellant's duly authorized signature to the five checks without discovery. This argument rests upon supposition only, and can be sufficiently answered by suggesting that, if Mr. Denbigh's methods and habits as to signing checks were as shown by the testimony, the risk of immediate discovery would have been too great for any one with reasonable judgment to assume. And moreover, if that had been the course followed, check number 30 would never have been destroyed by Boyd, as its continued existence would perhaps have protected him from detection and prosecution.

The implied contract between the bank and its depositor is that the bank will pay out the funds of the depositor only upon order from the depositor to that effect. It follows then, that, if the bank pays out funds upon an instrument purporting to be the check of its depositor, the signature upon which turns out to be a forgery, no right exists in the bank to charge the amount of the item against the account of the depositor, since the payment was wholly without any authority from him. This is elementary and needs the citation of no authorities. The only exception is where the depositor by his course of conduct, negligence or laches has created a condition which estops him.

We are quite clear that the appellant was not negligent in his manner of employing the bookkeeper, Boyd, he having employed him upon the recommendation of a reputable and well known business concern. Nor was he negligent in failing to discover that Boyd had been arrested upon a criminal charge of bigamy. It appears by the testimony that Boyd was going under an assumed name, and nothing in the testimony convinces us that the appellant was put on notice as to Boyd's dishonesty by anything which may have been published in connection with the criminal proceeding.

We are equally clear that the notice printed on the outside or front cover of the bank pass book, and the form of receipt for the monthly statement and vouchers requiring notice to be given within ten days, were not specially called to the appellant's attention and did not become a contract between the parties, and that it was not necessarily negligence on the part of the appellant to fail to comply strictly therewith. We are more specially of this opinion because of our statute, Rem. Code, § 3363, which provides:

"No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within sixty days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged."

While it is true that this statutory provision states the extreme limit within which such notice must be given in order to bind the bank, yet the legislature having fixed a limitation period, we do not favor a shorter limitation period by private contract unless strictly proven. Such a contract should never be presumed. Within the sixty-day statutory period each case must be determined from its own facts; and the question as to what is a reasonable time for the giving of such notice will depend upon the particular circumstances of the particular case, and not upon the arbitrary dictum of the bank.

Was the appellant negligent in not reporting the forgery to respondent bank until February 20, 1917?

It is argued that he was so negligent because knowledge of the forgery will be imputed to him as of February 2, 1917, when Boyd, his bookkeeper and the forger of the check, obtained the statement and can-

celed checks, including the forged instrument, from the respondent bank.

The general rule laid down in 7 Corpus Juris, p. 687, is that:

". . . when a depositor's pass book has been written up and returned to him with the canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time and to report any forgeries or alterations which he has discovered, failing in which he cannot, if his failure has resulted in detriment to the bank, dispute the correctness of the payments shown. . . ."

The authorities are by no means in harmony as to what is a reasonable time within which the depositor should report such forgeries or alterations, especially in cases where the employee who is responsible for the forgeries himself obtains the statements and vouchers from the bank. A leading case upon which the respondent seems to rely is that of *Leather Manufacturers' Bank v. Morgan,* 117 U. S. 96, in which it appears that the bookkeeper began his wrongdoing in September, 1880, and continued the same to February 13, 1881, and that his peculations were discovered in March following. The depositor's bank book appears to have been balanced monthly, or at frequent intervals, and if the employer had examined the several balancings, as was finally done in March, 1881, he would have "easily discovered" the wrongful withdrawal of the money. And the court properly held that the employer had failed to exercise that degree of care which, under all the circumstances, it was his duty to do.

Likewise in *Myers v. Southwestern Nat. Bank,* 193 Pa. St. 1, 44 Atl. 280, 74 Am. St. 672, the employee's wrongdoing covered a period of from March, 1891, to November, 1893, during all of which time he received the vouchers and statements from the bank and con-

cealed the facts from his employer. But the employer was held to have been negligent in never, during all that time, supervising the work of the employee or checking up his account with the bank.

So with all of the cases cited by the respondent upon this point, the period of delay in checking up and supervising the employee guilty of wrongdoing varies from a few months to several years. And in no case which has been called to our attention, or which we have been able to discover, has the court been called upon to say that a delay of only a few days, such as occurred in this case, was negligence on the part of the depositor.

In *Kenneth Inv. Co. v. National Bank of Republic*, 96 Mo. App. 125, 70 S. W. 173, cited by respondent, where a bookkeeper who forged his employer's signature to twenty-one checks covering a period from June to November, and who obtained the statements monthly from the bank and destroyed the forged checks, thus concealing his crime and keeping open the opportunity to continue, the court says:

"Chatard was engaged in a fraudulent scheme to obtain money on forged checks of his employer. To have disclosed the payment, cancellation and return of those forged checks would have prevented the consummation of his scheme; and it should not be presumed that he would inform his employer of his crime, and we hold that his knowledge of the forgery should not be imputed to the plaintiff."

In the case at bar, the appellant was absent, presumably in the pursuit of his business, at the time Boyd procured the statement and vouchers on February 2, 1917, and that absence cannot be charged against him as negligence. While he owed to the respondent bank the duty of supervision of the conduct of Boyd, yet he had a reasonable time in which to exercise supervision and to check up the January statement from the

respondent bank. This duty could not be performed, nor could appellant begin to perform it, until his return to Seattle on February 12 or 13, 1917. The evidence shows without dispute that he then obtained another bookkeeper, who came to work on February 17, or within five days after appellant's return, and who discovered the forgery on February 20, or within eight days after the appellant's return, and that the appellant immediately gave the respondent bank notice of such discovery. We cannot hold that there was any neglect or unreasonable delay shown upon the part of the appellant. And we can hardly conceive of any case where, under like circumstances, greater diligence was, or could be, shown.

Since there was no unreasonable delay in supervising and checking up Boyd's work, in discovering the forgery, and in reporting the forgery to the respondent bank, it becomes unnecessary to inquire whether or not the respondent bank was injured by that delay, which we have found to be reasonable and unavoidable under the circumstances of this case.

The judgment is reversed, and the cause remanded with instructions to enter a judgment in favor of the appellant and against the respondent for $3,500, with interest from March 19, 1917, the date of the demand, at the legal rate, and costs of suit.

MAIN, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 14749. Department One. June 15, 1918.]

CHARLES CARLSON, *Appellant*, v. WILLIAM S. MOCK *et al., Respondents.*[1]

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION OF REMEDIES—"PLANT." Giving a liberal construction to the proviso to Rem. Code, § 6604-3, which gives a workman entitled to industrial insurance the election to take under the act or to sue third persons for injuries occurring "away from the plant" of the employer, the "plant" of a street railway company does not include its street car tracks in a city street; hence its employee, run down by an automobile while engaged in oiling the tracks, is entitled to make the election.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 14, 1917, upon granting a nonsuit, dismissing an action for personal injuries sustained by a street railway employee struck by an automobile. Reversed.

Edwin H. Flick and *Fred D. Fletcher*, for appellant.

Roberts, Wilson & Skeel, for respondents.

TOLMAN, J.—This action was brought by the appellant against the respondents, Mock and wife, to recover damages for personal injuries. Trial was had before the court sitting with a jury, and at the close of the appellant's case, upon motion of the respondents, a judgment of nonsuit was entered. From this judgment, appellant brings the case to this court upon appeal.

The appellant, in his supplemental complaint, alleges, that he was employed as a track oiler by the Puget Sound Traction, Light & Power Company, and that, while engaged in the duties of his employment on the south track of the company's line on Jackson street near the intersection of Jackson street and Thirtieth

[1]Reported in 173 Pac. 637.

avenue, in Seattle, the respondent Mock drove an automobile south on Thirtieth avenue, thence around the corner at Jackson street, presumably intending to proceed west on Jackson street, traveling at such a reckless rate of speed that it was impossible for him to make the turn in a lawful manner and in accordance with the traffic regulations; that the speed of the car carried it well over to the south side of Jackson street and into the face of eastbound traffic; that appellant was struck by the automobile while so traveling, and that he received the injuries, to recover for which this action was instituted.

The answer admits that the respondent's automobile collided with the appellant while he was engaged in oiling the tracks as aforesaid, but denies all of the remaining allegations of the complaint and affirmatively pleads contributory negligence; and, for a second affirmative defense, alleges, that the appellant was in the employ of the Puget Sound Traction, Light & Power Company as a track oiler; that he was engaged in his duties as such track oiler upon the tracks of the company at the time he sustained the injuries; that the street car tracks of the said company are a part of its plant and are upon the premises of the company; that the occupation in which the appellant was engaged is inherently dangerous and extra hazardous as defined in the workmen's compensation act; and that, by reason of such facts, the court has no jurisdiction of the cause of action.

The appellant's reply denies the affirmative matter. There is, therefore, only one issue before this court: Was the appellant entitled to an election of remedies under the workmen's compensation act, ch. 74, Laws of 1911, p. 345 (Rem. Code, § 6604-1 *et seq.*)?

In § 1 of the act referred to, the legislature declared its intention in these words:

"The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; . . ." Rem. Code, § 6604-1.

The proviso upon which the appellant relies as fixing his right to elect to bring suit against the respondent is as follows:

"Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; . . ." Rem. Code, § 6604-3.

Consequently it is for us to inquire just what is meant by the words "occurring away from the plant of his employer." In view of the purposes of the act, it would seem that this proviso is entitled to the same liberal construction in favor of the workman as is the remainder of the act, to the end that the workman may have his election as therein provided and may, in all cases falling under the proviso, determine for himself whether to take under the act the certain benefits which it affords, or, if he thinks it more to his advantage, to relieve the insurance fund and the industry of the burden of compensating him and seek relief directly

against the person at fault. This would seem to be especially true when the objection is raised by the party charged with the fault, who might otherwise escape in whole or in part from the pecuniary loss occasioned by his own negligent act.

The word "plant" is variously defined. Webster's New International Dictionary defines it as follows:

"(a) The machinery, apparatus, fixtures, etc., employed in carrying on a trade or a mechanical or other industrial business; as, an electric light plant, a fishing plant, etc. In the commercial sense, a plant may include real estate and all else that represents capital invested in the means of carrying on a business, exclusive of the raw material or the manufactured product.

"(b) A work shop or other apparatus complete; as, a bicycle plant."

If one were to lose sight of the purposes of the act and construe the word "plant" strictly, he might, under some definitions, and possibly under this definition, say that it included the street railway tracks as a part of the plant of the operating company. But a liberal construction, having in mind the purposes of the act and the necessity of giving full force to the proviso, leads to the conclusion that the legislature never intended that the term plant should include more than that part of the employer's fixed property over which he has exclusive control, and cannot be applied to a public street or highway, though occupied by the employer for certain purposes, over which the general traveling public have at least equal rights with the employer, and over which the employer has no oversight or method of protecting the employee from the negligent or wrongful acts of third persons.

To hold otherwise would deny the right of election to all workmen whose regular duties take them upon the public highways. There seems to be no distinction between an employee of a street railway company who

works upon its tracks in the public streets, and a truck driver for instance, who is employed in transporting his employer's commodities between docks, warehouses, and freight depots along the public streets. Each has the same right to be upon the public street in the pursuit of his duties, and the fact that the employer in one case lays a permanent track, under a franchise, gives him no greater control over the use of the street by the general public, and no greater rights thereon, than has the other. Yet who would say that the public streets are a part of the plant of a manufacturing concern whose truck driver is constantly passing over them during the hours of labor?

This court has held that the industry must bear the burden of damages resulting from an act of a stranger on the premises of the employer. *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256. And we heartily reaffirm that doctrine. In that case the claimant elected to take under the act from the fund, and not to proceed against the third persons who committed the wrongful act. Hence the point here in issue was not there passed upon by the court.

In *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F 319, the claimant had elected, claimed and received a final award for his injuries from the industrial insurance fund, and thereafter brought an action against the physician employed by his employer for malpractice in treating his injuries, and the proviso, § 3 of the act, Laws of 1911, p. 346 (Rem. Code, § 6604-3), was not in any way involved, as it is here, and no attempt was made by the court in that case to lay down any rule which would be decisive of this case.

In *Meese v. Northern Pac. R. Co.*, 206 Fed. 222, it appears that the workman was employed by the Seattle Brewing & Malting Company at its plant in Georgetown, and the defendant railway company had a track

running alongside of such plant, apparently built and used for the purpose of serving the brewing company, upon which it furnished shipping facilities to the brewing company. After cars were placed upon such track by the railway company they were spotted and moved about and loaded by the brewing company as required by its business. The deceased workman, at the time of the accident, was doing the work of his employer, but actually upon the private right of way of the railway company. Judge Cushman, in that case, held that the workman was killed, not away from, but at the plant of his employer, saying:

"'At the plant' may include less or more than 'on the premises,' depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries."

A doctrine to which we might subscribe without deciding this case. But had the accident considered in that case occurred miles instead of feet from the employer's boundary line, and upon a public highway in a populous city, where the employer could exercise no oversight or control and could not maintain any sort of protection against the public generally, who had at least equal rights thereon, we apprehend the result would have been different. We think there is a narrow but plain distinction between that case and this upon the facts; but if not, we decline to follow Judge Cushman's rule.

The *Meese* case afterwards reached the supreme court of the United States (*Northern Pac. R. Co. v. Meese,* 239 U. S. 614), and that court affirmed Judge Cushman, upon the theory that this court, in *Peet v. Mills,* 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915D 154, L. R. A. 1916A 358, had so construed the industrial insurance act as to take away the right of action. In the

Peet case, the employee was injured in a collision upon the private right of way of the railway company, which was his employer. He brought his action, not against the company, but against its president individually, charging him with negligence. There was not, and could not be, any question raised in that case as to the injury occurring away from the plant of the employer, and the question here presented was not in any way considered by this court in that case. Unfortunately the Federal supreme court appears to have been misled by the general discussion of the purposes of the act in that case.

The fact that all of the employees of street railways are, by its terms, brought under the act does not, of course, conflict with our views as to the meaning of the proviso, because an employee must be under the act before he can elect under the proviso.

To hold with the respondent's conclusions would be to deny a right of election, a valuable right given to the workman by the statute, and place upon the industry a burden of which the workman by his election may relieve it, and to say to those who negligently or recklessly use the public streets, "You may not be brought to the bar of justice to answer for such acts as these by the person injured, but only through a deferred and delayed action brought by the state after all private rights have been satisfied from the insurance fund." Such a deferred action would be only for the purpose of reimbursing the fund, and the opportunities for the wrongdoer to escape, in whole or in part, are apparent.

The judgment of the trial court is reversed, with directions to proceed in accordance with the views herein expressed.

MAIN, C. J., MITCHELL, FULLERTON, and PARKER, JJ., concur.

[No. 14632. Department Two. June 17, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE THOMAS, *Appellant*.[1]

FORGERY—INDICTMENT—INTENT TO DEFRAUD—SUFFICIENCY. An information for forgery, setting forth the instrument as forged with intent to defraud is sufficient without stating the names of the persons defrauded; in view of Rem. Code, § 2303, providing that it is not necessary to prove intent to defraud any particular person, and Id., § 2292, providing that where an intent to defraud is an element of the offense, it is sufficient to prove an intent to defraud any person whatsoever.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 12, 1917, upon a trial and conviction of forgery. Affirmed.

John T. Casey, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

CHADWICK, J.—Appellant was charged upon the following information:

"He, said George Thomas, in the county of King, state of Washington, on or about the 22d day of March, A. D. 1917, with intent to defraud, did then and there wilfully, unlawfully and feloniously forge a certain written instrument, to wit: a check, in the words and figures following, to wit:

"No. 122. Seattle, Wash., Mar. 22, 1917.

"To the Seattle Branch

"The Canadian Bank of Commerce 19-13

Pay George Thomas.....$15.00 or order

Fifteen Dollars.....100 Dollars

"A. C. Paul.

said written instrument then and there being a request for the payment of money.

"Contrary to the statute in such case made and provided and against the peace and dignity of the State of Washington."

[1]Reported in 172 Pac. 650.

He appeals from a judgment of conviction, contending that the information does not charge a crime, in that it does not state the nature and the cause of the accusation as is required under § 22, art. 1, of the constitution, and that it does not state the facts in ordinary and concise language so that a person of common understanding may know what is intended, as required by subd. 2, § 2055, Rem. Code, and that it does not conform to, and that it is not sufficient under, § 2057 and subdivisions 6 and 7 of § 2065, Rem. Code, in that it does not state the name of the person intended to be defrauded.

It is a settled rule of law that the crime of forgery may be charged by setting forth the instrument saying that it is forged and with intent to defraud, § 2583, Rem. Code; 12 R. C. L., p. 154; 9 Ency. Pleading and Practice, p. 555; 11 Standard Enc. of Procedure, 1142.

It is also held, almost without contradiction in the cases, that it is unnecessary to name the particular person intended to be defrauded. It is provided in § 2303 of Rem. Code, subd. 5, "that it is not necessary to aver or prove an intent to defraud any particular person," and in § 2292 that, whenever an *intent to defraud* is an element of an offense charged, it is sufficient to sustain a conviction if the testimony shows that there was "an intent to defraud any person, association or body politic or corporate whatsoever." See *State v. Pilling*, 53 Wash. 464, 102 Pac. 230, 132 Am. St. 1080.

There being no statement of facts, we are bound to assume that the proof disclosed an intent to defraud some particular person, association, body politic or corporate.

We find no error, and the judgment is affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 14692. Department Two. June 17, 1918.]

WHATCOM TIMBER COMPANY, *Appellant*, v. CHARLES WRIGHT, *Respondent*.[1]

COVENANTS — OF SEIZIN — ACTION FOR BREACH — LIMITATION OF ACTIONS. A covenant of seizin is broken at the moment it is made, if there could be no seizin by grantee, and the statute of limitations commences to run immediately.

SAME—WARRANTY—ACTION FOR BREACH—LIMITATIONS. Covenants of warranty and quiet possession of land the title to which was in the United States and in the possession of third persons, are broken when made without further acts of the parties, and the statute of limitations against an action for breach commences to run from the date of the deed.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 19, 1917, upon sustaining a demurrer to the complaint, dismissing an action for breach of covenant. Affirmed.

Jesse A. Frye, for appellant.

Hartman & Hartman, for respondent.

HOLCOMB, J.—Appellant brought this action to recover damages from respondent for breach of the covenants of warranty contained in a deed from respondent to appellant of certain land in Whatcom county. The amended complaint, after alleging corporate capacity, is as follows:

"(2) That on March 14th, 1902, the defendant, in consideration of the sum of six and 50-100 ($6.50) dollars per acre, to him in hand paid by the plaintiff, conveyed and granted to plaintiff by deed, together with other real estate located in Whatcom county, Washington, the following: [Description omitted] and which said deed was, on March 15, 1902, filed by the auditor of Whatcom county, Washington, and recorded in Vol. 61 of Deeds, page 210 of the records of said Whatcom

[1]Reported in 173 Pac. 724.

county; and in his said deed said defendant warranted to this plaintiff that he had good title in fee simple to said property, and would warrant and defend plaintiff in its possession of same.

"(3) That defendant had not, at the time of the execution and delivery of said deed, a good and sufficient title in fee simple to said premises, but same were owned by the United States of America and in the possession of the following persons, to wit: The first described tract of land was in the possession of Nicholas Baker, and the second described tract of land was in the possession of Charles Schwab, and that, by reason of the fact that defendant was not the owner of said lands, plaintiff was, on the 6th day of October, 1910, ousted and dispossessed of the first described tract of land by due course of law, and ousted and dispossessed of the second described tract of land on the 12th day of April, 1912; and each of the owners of said tracts have, since said respective dates, held and still continue to hold plaintiff out of the possession of said lands.

"(4) That plaintiff has been compelled to pay and lay out costs and charges and counsel fees in defending title to said lands to the amount of six hundred sixteen and 73-100 dollars.

"Wherefore plaintiff prays," etc.

A demurrer, on the grounds that the complaint did not state facts sufficient to constitute a cause of action and that the action has not been commenced within the time limited by law, was sustained. The ruling in this respect, as well as the judgment of dismissal on the refusal of the appellant to plead further, is assigned as error, and they will be considered together.

The deed in question contained the three covenants —of title in fee simple, of warranty, and of quiet possession. The first is a covenant of seizin and was broken the moment it was made, if there could be no seizin by grantee. *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098; *Potwin v. Blasher,* 9 Wash. 460, 37 Pac. 710; *Decker v. Schulze,* 11 Wash. 47, 39 Pac. 261,

48 Am. St. 858, 27 L. R. A. 335; *Wick v. Rea,* 54 Wash. 424, 103 Pac. 462.

The last two covenants are covenants *in futuro,* and the statute of limitations begins to run from the time they are broken. The precise time when these covenants were broken and when the statute began to run is the controlling question to be decided. The appellant alleges that, at the time the deed was executed and delivered, the title was in the United States, and possession was in one Baker and in one Schwab. Appellant did not obtain possession, and, therefore, the general rule, that the warranty is not broken until eviction or some substantial interference with the possession, is not applicable in this case. The deed was a nullity *eo instanti;* only a color of title which could in some cases ripen into a good title by possession for the statutory period. If, at the time the deed is executed the premises are in the possession of third persons claiming under a superior title and grantee cannot be put into possession, the covenant of warranty is broken when made, without any further acts of the parties.

Ilsley v. Wilson, 42 W. Va. 757, 26 S. E. 551, is decisive on the point that if land conveyed by general warranty is in adverse possession under paramount title at the execution of the deed, the grantee's eviction dates, and the statute of limitations against an action for breach of warranty runs, from the date of the deed. In *Pevey v. Jones,* 71 Miss. 647, 16 South. 252, 42 Am. St. 486, the facts are almost identical with those in this case. The court said:

"As to the land belonging to the United States, the covenant of warranty was broken the instant it was made, and a right of action on it then accrued, and was barred when this action was commenced. The true doctrine is that the United States are always seized of their lands, and cannot be disseized as private owners may be; that land belonging to the United States can-

not lawfully be the subject of sale and conveyance by individuals, so as to confer any right; that a grantee of such land by another than the United States cannot take possession without becoming a wrong-doer, and liable to summary ejection; and, therefore, that a covenant of warranty, in a conveyance of land belonging to the United States, must be viewed differently from one where the ownership is by a private person; that the grantee is not required to take possession, or attempt to get it, and that a right of action immediately accrues to recover for a breach of the warranty, not dependent on any future event, but fixed by the fact of ownership of the land by the government. In this case, the grantee acquired nothing whatever as to the land owned by the United States; and, by virtue of the transaction, his vendor, on receipt of the purchase money, thereby at once became liable to him for money received to his use."

We are obliged to hold that appellant's cause of action existed at the time the deed was executed and is now barred by the six-year statute of limitations. The ruling of the trial court on the demurrer and entering judgment of dismissal was proper. Affirmed.

MAIN, C. J., MOUNT, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14803. Department One. June 17, 1918.]

NORTHWESTERN NATIONAL BANK OF PORTLAND, *Respondent*, v. ALEXANDER PEARSON, *Appellant*.[1]

BANKS AND BANKING — CONTRACTS — AGREEMENT FOR LOAN — EVIDENCE—SUFFICIENCY. The evidence sustains findings that a bank did not agree to extend a credit of $50,000 to finance a contract, where all the negotiations were with the bank's vice president, who testified that he informed the contractor he could not make a loan in excess of $10,000 without approval of the discount committee, that he authorized a loan for $5,000 pending investigation and demand note was given therefor, and it appears that the discount committee declined to approve the credit and notice of such declination was immediately given.

BILLS AND NOTES—ACTIONS—DEMAND. A demand is not a prerequisite to suit upon a demand note, made payable at the office of the plaintiff bank, the bringing of suit being a sufficient demand.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 11, 1918, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Arthur C. Dresbach and *Benton Embree*, for appellant.

Roberts, Wilson & Skeel, for respondent.

MITCHELL, J.—This is an action on a $5,000 demand note, given by appellant, defendant, to respondent.

The complaint is in the usual form, and alleged demand and nonpayment. The answer admits the making of the note, that respondent is the holder thereof, and denies the other allegations of the complaint. Affirmatively, the answer gives a history of the making of the note, and presents counterclaims to the effect that appellant is a general contractor and as such procured a

[1]Reported in 173 Pac. 730.

contract for the construction of viaducts and their approaches, etc., across certain streets of Portland, Oregon; that, needing funds to carry on the work, application was made to respondent, which is engaged in the banking business in Portland, Oregon, for a line of credit to the amount of $200,000, to be available as needed, which resulted in an agreement that the bank would finance the undertaking to the extent of $50,000, to be evidenced by demand promissory notes to be given from time to time as the money was furnished, payable only after the completion of the work; that the note in suit was given under such understanding; and that thereafter, depending upon respondent to supply funds, without fault of appellant, while appellant was engaged in the performance of his construction contract, respondent refused to further furnish money, to appellant's damage in the sum of $20,700, because otherwise unable to seasonably arrange to carry out an agreement already made for excavation and fill work at a price less than he was afterwards able to procure, because of advancing prices; and also other damages in the sum of $18,000 on account of being thus disadvantaged as to ready funds to provide for sand and crushed rock needed. By reply, all the affirmative matter in the answer is denied, except that the bank is located in Portland. There was a non-jury trial, resulting in findings, conclusions and judgment according to the demand of the complaint.

It is evident that if appellant has failed to prove the general oral contract with respondent for money as needed to the extent of $50,000, then there is no occasion to consider the alleged counterclaims, nor the many questions of fact and law suggested thereby.

Sometime after commencing the work in Portland, appellant first saw the bank, and at that time, on request, appellant furnished a financial statement which

was used by the bank for its investigations in addition to ascertaining ratings by the mercantile agencies; and about a week later, April 7, the investigations of the bank still going on, plans had progressed so far that Mr. Olmstead, vice president of the bank, on learning that appellant had to leave that day or the next for Iowa, furnished him with blank notes and checks for use of appellant's Portland office. Appellant claims that he was at that time promised $50,000 credit. Mr. Olmstead testifies that he told appellant he hoped to arrange the matter for him, but that, as an officer of the bank, he could not make a loan exceeding $10,000 without securities, and that this proposed credit of $50,000 would have to be authorized by the discount and loan committee of the bank, to which he would submit it at their next meeting; and that he supplied appellant with the blank notes and checks before leaving on his trip, for use during his absence in the event the credit was authorized by the bank's committee. Appellant left on his eastern trip on April 7 or 8, and on the 10th of April the bank's committee, at a regular meeting, considered this application for a $50,000 credit and decided to grant it upon proper securities being furnished. Appellant's financial standing was still being looked into by the bank. About April 14, the note in suit was delivered to the bank by Roy Johnson, the head man and the one in charge of appellant's Portland office, and the amount was placed to the credit of appellant's checking account. This loan of $5,000 was made, as Mr. Olmstead testifies, on his own responsibility as an officer of the bank, while the bank's discount and loan committee was yet considering the application for the $50,000 credit. Subsequently, on April 17, the bank's discount and loan committee further considered this application and declined to make the loan, and Mr. Olmstead immediately notified appel-

lant, who returned to Portland and was then advised by Mr. Olmstead that the committee was not satisfied with the securities offered. All of appellant's negotiations were with Mr. Olmstead.

The foregoing are the salient features of the proof in this case, and we are of the opinion that the trial court was right in determining that appellant failed to show a contract such as is alleged in the answer; and, among other things in the proof strongly inducing this view, is the fact that the note in suit, by its terms, is payable on demand, while confessedly it was thought at that date by the parties that the work would not be finished for a year or more.

The only remaining question raised by appellant is that of demand for payment of the note prior to bringing the suit. It is shown by the record that, on three different occasions after appellant returned from the east, respondent by letter demanded payment of this note, one of which letters was addressed to appellant at his address in Seattle according to directions as to his residence or place of business indorsed on the note at the time it was made, all three of which letters were in the possession of appellant and produced upon demand at the trial of this cause. Besides, remembering that the note in suit, by its terms, is made payable at the office of the bank, the law of this state is as expressed in the case of *Hardin v. Sweeney,* 14 Wash. 129, 44 Pac. 138, where we quoted from *Bridge Co. v. Perry,* 11 Ill. 467, as follows:

"Nor is a presentment necessary, on a bank note payable on demand at a particular place. The bringing of a suit is a sufficient demand of payment."

Finding no error in the record, the judgment will be affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14818. Department One. June 17, 1918.]

THE STATE OF WASHINGTON, *on the Relation of R. D. Simpson, as Trustee etc., Plaintiff*, v. EVERETT SMITH, *Judge etc., Respondent.*[1]

APPEAL — DECISIONS REVIEWABLE — AMOUNT IN CONTROVERSY. An order in a garnishment proceeding suspending remedies upon a judgment for costs in the sum of $160.65, recovered on appeal to the supreme court, being an independent proceeding to recover less than $200, is not reviewable in the supreme court.

CERTIORARI—JURISDICTION—AMOUNT IN CONTROVERSY. The limitation of $200 upon the jurisdiction of the supreme court, is equally applicable to appeals and to writs of review.

Application filed in the supreme court April 23, 1918, for a writ of certiorari to review an order of the superior court for King county, Smith, J., in garnishment proceedings. Denied.

W. W. Keyes and *Kelly & MacMahon*, for relator.

Bausman & Oldham (*Don G. Eggerman* and *Walter L. Nossaman*, of counsel), for respondent.

FULLERTON, J.—The relator, as trustee in bankruptcy of the Tacoma Ornamental Iron Works, brought an action against the Western Hardware & Metal Company to recover assets of the bankrupt which it was alleged had been preferentially transferred to the defendant in violation of the bankruptcy act. An appeal was taken from a judgment for the defendant, on which appeal the lower court was reversed and the cause remanded for a new trial. *Simpson v. Western Hardware & Metal Co.*, 97 Wash. 626, 167 Pac. 113. On the appeal, the plaintiff recovered costs in the sum of $160.65.

After the judgment of this court had become final, the plaintiff sued out a writ of garnishment against

[1]Reported in 173 Pac. 428.

the Seattle National Bank for the purpose of recovering the amount of the costs. The bank answered, admitting an indebtedness to the hardware company, but by way of affirmative defense and as a plea in abatement, answered that the original cause was pending and undisposed of, and that the questions involved in such cause were reviewable in the supreme court of the United States; and alleged on information and belief that, in case of a final decision by the state supreme court on appeal adverse to the principal defendant, the latter would resort to a review of the decision by the supreme court of the United States, and that a decision by that court in favor of defendant would involve a reversal of the judgment in plaintiff's favor for the costs, and that, by reason of a possible reversal by the Federal court, the garnishee defendant would be exposed to danger of a double liability if it should pay such judgment for costs, inasmuch as it would, in case of reversal, be liable to refund to defendant any sum paid under such writ of garnishment. It prayed that further proceedings under the writ be restrained until after the final disposition of the cause, and that all proceedings against it abate until the expiration of the time of final adjudication upon the liability of the principal defendant. On the filing of the answer, the plaintiff moved for an order against the garnishee bank, directing it to pay the amount of the judgment into the registry of the court, whereupon the court, after a hearing thereon, entered the following order:

"It is hereby ordered that the matter of the motion of the plaintiff for judgment against the garnishee defendant, and the matter of the motion of the plaintiff to require the garnishee defendant to pay into court the sum due plaintiff upon the judgment against the defendant herein be and the same is hereby held in abeyance until the final determination of this action up-

on the proposed appeal to the supreme court of the United States."

The present proceeding is an application made to this court for a review of the order so entered. The petition for the writ, among other things, set forth the following allegations:

"(8) That the matters and things set forth in the affirmative defense of the garnishee defendant as disclosed by said answer are outside of and beyond the matters which can be litigated by the garnishee defendant in said proceeding, and if in law said matters could be litigated in said proceeding, the facts therein alleged constitute no defense in said proceeding and are such that no issue can be made thereon.

"(9) That the entry of said order by the defendant is in excess of the jurisdiction of the defendant and is erroneous and void, in this:

"(a) That the said judgment of this court is final and conclusive upon all the parties thereto, and that the defendant is without power to interfere with the collection thereof.

"(b) That the said defendant is without power to hold the collection of said judgment in abeyance.

"(c) That the said defendant is without power to suspend the rights of this affiant for an indefinite period upon problematical and uncertain contingencies.

"(d) That the said defendant is without power to refuse for an indefinite and uncertain time to act upon the motion of affiant."

The respondent in the writ demurs to the petition upon the ground, among others, that this court has no jurisdiction to award the relief asked. Construing Rem. Code, § 1744, declaring the prevailing party entitled to costs, we have held that a litigant who secures a reversal on appeal is entitled to his costs in the supreme court, irrespective of the ultimate result of subsequent retrials. See *Briglio v. Holt & Jeffrey*, 91 Wash. 644, 158 Pac. 347; *Klock Produce Co. v. Diamond Ice etc. Co.*, 98 Wash. 676, 168 Pac. 476. This

rule probably indicates error in the order of the court, but we are forced to the conclusion that we are without jurisdiction to grant relief. The matter in controversy is the recovery of this judgment for costs, not the matter involved in the proceedings wherein the judgment for costs was entered. It is an independent proceeding and, since the amount involved does not exceed $200, this court is without jurisdiction to review the order in virtue of the limitation contained in § 4, art. 4, of the constitution. It is no answer to say that the limitation in the constitution is upon the appellate jurisdiction of the court, while this is an application for a writ of review. In cases of this sort, a writ of review is only another form of appeal, and a limitation upon the one is equally a limitation upon the other. *State ex rel. Hamilton v. Superior Court,* 8 Wash. 271, 36 Pac. 27; *State ex rel. Corbin v. Superior Court,* 35 Wash. 201, 77 Pac. 33; *Wade v. Weber,* 82 Wash. 591, 144 Pac. 901.

The writ is denied.

PARKER, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14510. Department One. June 18, 1918.]

D. H. Moss, *Respondent*, v. GEORGE RUBISON *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—FINDINGS EMBODIED IN ORDER. It is not necessary to except to findings of the court mingled with the recitals of the decree, in view of Rem. Code, § 382, which provides that it is not necessary to except to any ruling or decision which is embodied in a written judgment or order.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 3, 1917, in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

James T. Lawler, for appellants.

Hughes, McMicken, Ramsey & Rupp and *John P. Garvin*, for respondent.

MITCHELL, J.—Respondent, plaintiff, sues on four promissory notes given by appellant George Rubison, on different dates, on account of money loaned by respondent.

It is alleged that, at the time of giving the first note and as a part of the same transaction, George Rubison indorsed in blank and delivered to respondent as collateral two promissory notes executed and delivered by one John W. Considine to C. K. Poe and by the latter indorsed in blank, without recourse, and delivered to George Rubison. It is also alleged that, at the time of the making and delivery of each of the three subsequent notes sued on, the two Considine notes were further pledged as collateral thereto. It is alleged that, upon maturity of that one of the Considine notes first falling due, respondent brought suit on it in the name of George Rubison, by his consent, and recovered

[1]Reported in 173 Pac. 625.

judgment against Considine, which judgment, still unsatisfied, was duly assigned by George Rubison to respondent as collateral in lieu of the note upon which the judgment was obtained; that none of the notes sued on has been paid and all are past due; that George and Mollie Rubison are husband and wife and, together with the other appellant, claim some interest, alleged to be subordinate, in and to the judgment on the Considine note, and also the other Considine note now held by respondent as collateral. Judgment is demanded against George and Mollie Rubison, as husband and wife, on the four notes given by George Rubison, and also foreclosing the lien or pledge as to the judgment and remaining note given by Considine as against all of the appellants.

Appellants admit the notes sued on and deny that the Considine note, other than the one put in judgment, was pledged, and allege that both notes were placed with the bank, of which respondent was an officer, for collection only; and also allege that both notes were, within the knowledge of respondent, the notes of the minor for whose benefit they were given by Considine. There was a trial without a jury, and judgment given as demanded in favor of respondent.

Respondent moves that the statement of facts be stricken and the judgment affirmed on the ground that no exceptions were taken to any of the court's findings. There were no formal findings separately stated and numbered, and what respondent contends are findings consist of certain matter commingled with the recitals of the decree and following the words, "It is by the court hereby considered, ordered, adjudged and decreed," which constitute the introductory words of the decree. In such case no exception is necessary, because of the provision of § 382, Rem. Code, to the effect that it shall not be necessary or proper to take or

enter an exception to any ruling or decision which is embodied in a written judgment, order, etc. The statement of facts will not be stricken.

George and Mollie Rubison are husband and wife. The other appellant is the minor child of George Rubison. On account of a liability, the right of action for which is given the father by §§ 185 and 186 of Rem. Code, George Rubison, with the assistance of his lawyer, C. K. Poe, made a settlement with Considine which included two notes, one for $2,500, the other, $5,000, made by Considine to C. K. Poe. These two notes were indorsed in blank, without recourse, and delivered by the payee to George Rubison, who first placed them with the First National Bank, of which respondent is an officer, for collection. Later on, George Rubison on four different occasions borrowed money from respondent, giving his notes therefor, the same being the notes sued on in this action. Respondent's evidence shows that the two Considine notes were pledged as collateral, and that, at the time George Rubison gave his first note, there were indorsed upon it, prior to its being signed, the words: "Notes of John Considine for $7,500 pledged as collateral," and that similar words were written on each of the two subsequent notes at and prior to being signed by George Rubison, but that no such words were written on the other of the notes because of oversight, though understood it was to be supported by the same collateral. At the time of giving the third note, the minor indorsed the $2,500 Considine note, but was not asked to indorse the other. George Rubison's testimony is to the effect that there was no indorsement on any of his notes as to the pledging of the Considine notes as collateral at the time of his signing, and that only the $2,500 Considine note was pledged. There is positive testimony of a disinterested witness, who prepared the first of the Rubison notes,

that both Considine notes were pledged and a statement to that effect written on the Rubison note before he signed it. All four of the notes sued on were given before the maturity of either of the Considine notes. The first one of the Considine notes to fall due was the $2,500 one, and not being paid, it was put in judgment in favor of George Rubison, who assigned the judgment to respondent.

Appellants ask no relief except as to the $5,000 Considine note, claiming it was not pledged and that the note was the property of the minor. Under §§ 185 and 186, Rem. Code, as already noticed, the cause of action was in the father, and while there is a dispute as to whether or not the notes were pledged, there is ample proof to sustain that view, independent of and not inconsistent with the fact that the minor indorsed one of them.

Thus it appears that this cause depends largely upon questions of fact; and following the rule enjoined by statute, bearing in mind the respect accorded the expressed opinion of the trial court thereon, we have carefully examined the evidence and find that by a preponderance it supports the judgment, which is hereby affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14654. Department One. June 18, 1918.]

KNICKERBOCKER COMPANY, *Respondent*, v. ELSIE C. HAWKINS *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—WIFE'S SEPARATE DEBT—CONSIDERATION FOR NOTE—HUSBAND'S DEBT. In view of Rem. Code, §§ 5925-5927, removing all disabilities imposed by the common law upon married women, extension of time for payment of the husband's separate debt is a sufficient consideration for the wife's note and mortgage binding her separate property.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 13, 1917, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Kerr & McCord, for appellants.

Charles A. Riddle, for respondent.

PARKER, J.—The plaintiff, Knickerbocker Company, seeks recovery upon a promissory note and the foreclosure of a mortgage securing payment thereof, both of which were executed by the defendants, Elsie C. Hawkins and husband. Trial in the superior court resulted in judgment and decree of foreclosure against both defendants, from which she alone has appealed to this court. She defended in the superior court upon the theory that the note was given in payment of the separate debt of her husband, and that the property conveyed by the mortgage was then, and still remains, her separate property, and that, therefore, both were executed without consideration, in so far as her separate or community liability is concerned. She also defended in the superior court upon the theory that she executed the note and mortgage under duress and against her will. Her husband made no defense in the

[1]Reported in 173 Pac. 628.

trial court, nor does he here seek reversal of the judgment and decree.

In October, 1913, appellant's husband had been an employee of respondent for several years and had then become indebted to it in the sum of $1,745, which indebtedness was, at least in part, the result of appropriations made by him from time to time of its funds. Whether or not these appropriations were of such wrongful character as to render him criminally liable therefor is not rendered certain by the evidence before us, though the appellant insists that the president of the corporation so viewed her husband's appropriations. In order to settle this indebtedness, appellant and her husband, on November 1, 1913, executed the note and mortgage here sued upon, which being payable three years after date, matured on November 1, 1916. Thereafter the debt evidenced thereby having remained wholly unpaid, this suit was commenced in the superior court for King county, seeking judgment and foreclosure as above noticed. Appellant claims that she was coerced and induced to execute the note and mortgage against her will by the threat of the president of the respondent to prosecute her husband criminally if she did not do so. No prosecution was ever instituted, nor were any public officers ever consulted by the president of respondent looking to the institution of any such prosecution. We assume, for argument's sake, that the property covered by the mortgage was, at the time of its execution, and still is, her separate property, and also that the debt, by reason of the manner of its creation, was the separate debt of her husband.

It is first contended in appellant's behalf that the debt of her husband for which the note and mortgage were executed by her with him being his separate debt, there was no consideration moving to her to support

any legal liability against her or her separate property. This contention seems to be fully answered by our statutes removing all disabilities imposed by the common law upon married women and rendering them as free to contract with reference to their separate property as unmarried women. Sections 5925, 5926 and 5927, Rem. Code. Manifestly, had appellant been a stranger to her husband and executed the note and mortgage with him, she and her separate property would have been bound by such execution, and the three years' extension of time given by the respondent to her husband for the payment of the debt would have been ample consideration therefor. In view of the status of married women as to their property and their power to contract under our statutes, it seems to follow as a matter of course that this consideration was sufficient to support her contract evidenced by the note and mortgage. *Jamison v. Jamison,* 3 Whart. (Pa.) 457, 31 Am. Dec. 536; *Green v. Scranage,* 19 Iowa 461, 87 Am. Dec. 447.

Counsel for appellants seem to place some reliance upon the early decision of this court in *Board of Trade of Seattle v. Hayden,* 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530, holding that the wife's power to contract under our statute does not enable her to bind her separate property by a contract of partnership with her husband. In that case there was involved the rights of creditors who were seeking to subject the wife's separate property to the payment of their claims upon the theory that she was her husband's partner in the business, the creditors' claims being debts contracted by the alleged partnership. That, we think, is quite different from the question of the liability of the wife arising out of her express contract evidencing a specified debt and security therefor as a charge against her separate property. It seems quite

plain to us that the note and mortgage here involved cannot fail in their binding effect as against appellant and her separate property because of want of consideration.

It is next contended in appellant's behalf that the note and mortgage are void because executed under duress consisting of threats on the part of the president of respondent to have her husband criminally prosecuted unless she executed with her husband the note and mortgage in question. This contention presents only a question of fact, as to which the evidence is in serious conflict in so far as it consists of the testimony of interested witnesses. Should we look only to the testimony of such witnesses, it might be said that the evidence is fairly evenly balanced, but there were facts appearing from other evidence which to our mind fully warranted the trial judge in concluding that appellant freely and voluntarily executed with her husband the note and mortgage sued upon. We do not think this contention calls for further discussion.

The judgment and decree are affirmed.

MAIN, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 14741. Department Two. June 18, 1918.]

J. H. FITZGERALD *et al., Respondents,* v. THE CITY OF CENTRALIA, *Appellant.*[1]

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained upon a defective sidewalk, photographs introduced to meet the city's contention that the street was not a public thoroughfare are not inadmissible because they show a changed condition, a new board put in place of the old board which was already in the case as an exhibit.

APPEAL—REVIEW—HARMLESS ERROR—EXHIBITS—IDENTIFICATION. Failure to allow cross-examination at the time of the identification of an exhibit is merely an irregularity, where full opportunity was given later and the witness was cross-examined regarding the identification.

APPEAL—RECORD—EXCEPTIONS. Error cannot be assigned upon the failure to give an instruction, where no exception thereto appears in the record.

APPEAL—REVIEW—MISCONDUCT OF JUDGE. The utterance by the trial judge of an impatient remark cannot be assigned as error, if it was not error or prejudicial.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered October 8, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

Gus L. Thacker and *Wm. R. Lee,* for appellant.

Forney & Ponder and *C. D. Cunningham,* for respondents.

MACKINTOSH, J.—The city of Centralia appeals from a judgment entered upon the verdict of a jury in a case brought to recover damages for personal injuries sustained by the respondent when she tripped and fell over a board in one of the sidewalks of the city. The complaint having been served upon the city clerk in-

[1]Reported in 173 Pac. 631.

stead of the mayor, the appellant appeared specially and objected to the jurisdiction of the court, but this special appearance was waived by general appearances made by the appellant, both at the time of and subsequent to the attempted special appearance.

At the trial, photographs were introduced in evidence showing the sidewalk in the vicinity and at the place where the respondent's injury occurred, and during the examination of one of the witnesses concerning these photographs, it was testified "that it did not look like it did on the day of the injury. There is a new board put in." It is contended that this presented to the jury the fact that subsequent repairs had been made, and was therefore prejudicial error. The photographs were not introduced for the purpose of showing subsequent repairs, but were introduced to meet the contention of the appellant that the street in question was not a public thoroughfare, and for the purpose of proving a general, open and notoriously defective condition of the walk, as well as tending to prove the recognition of the thoroughfare as a street by the city. In doing this the witnesses testifying as to the photographs were properly asked to state whether the condition portrayed was in fact the same condition that existed at the time of the injury, and, in answer to that question, it appeared that another board had been substituted for the one over which the respondent fell; this testimony was not presented as evidence of subsequent repairs, but as explanatory of the exhibits. That there must have been a changed condition had already appeared in the testimony in another way, by reason of the fact that the board over which she fell was then in court as an exhibit in the case. The objections to the introduction of the exhibits and to the testimony regarding them were properly overruled.

Upon the production of the board it was identified, at least by *prima facie* evidence, as being the one in the walk at the time of, and which had caused, the injury, and it was admitted in evidence. The appellant was not allowed to interrupt the direct examination of the witness for the purpose of inquiring as to her identification of the proposed exhibit, but was given that opportunity at the time of regular cross-examination. This is alleged as error. It would have been better practice to have permitted the appellant to examine the witness at the time the exhibit was offered and before its acceptance in evidence, rather than to postpone that examination until the regular cross-examination, but it was a mere irregularity, as the appellant had full opportunity to subsequently cross-examine and have the exhibit withdrawn, had facts developed sufficient to justify that result. The appellant did cross-examine the witness regarding her identification of the exhibit, but thereafter made no motion for its exclusion. Therefore, there was no prejudice resulting from the court's action.

Error is assigned upon the refusal of the court to give a proposed instruction, but as the statement of facts and record do not disclose any exception to this refusal to instruct, we cannot consider this assignment. *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202.

At the time appellant was taking exceptions to certain rulings respecting testimony, the court inadvertently gave utterance to an impatient remark, which, however, did not transgress to the extent of being an error, and certainly was not of sufficient importance to have been prejudicial. Trial judges (and possibly appellate ones) are human beings and are not to be held to commit reversible error if they occasionally mildly manifest the very human quality of impatience. They

may be allowed the benefit of the plea *"molliter manus imposuit."*

Finding no error in the record, the judgment of the lower court is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14844. Department Two. June 18, 1918.]

THE STATE OF WASHINGTON, *on the Relation of the Tacoma Eastern Railroad Company, Appellant,* v. PUBLIC SERVICE COMMISSION *et al., Respondents.*[1]

CARRIERS—REGULATION—OVERCHARGES — ORDER OF PUBLIC SERVICE COMMISSION—REVIEW—STATUTES. Under Rem. Code, § 8626-86, providing for writs of review to review "any order" of the public service commission, certiorari lies to review the commission's order for the repayment by a carrier of an overcharge; and the shipper need not first assail the order in an action to recover the overcharge authorized by Id., § 8626-91.

Appeal from an order of the superior court for Thurston county, Mitchell, J., entered April 25, 1918, quashing a writ of review to review an order of the public service commission directing the refund to a shipper of overcharges for transportation services. Reversed.

F. M. Dudley, for appellant.

John E. Belcher, for respondent James A. Belcher.

The Attorney General and *Hance H. Cleland, Assistant,* for respondent Public Service Commission.

HOLCOMB, J.—This is an appeal from an order quashing a writ of review and dismissing the proceedings. The facts leading up to this proceeding may be more

[1]Reported in 173 Pac. 626.

fully found in *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782. On December 1, 1917, respondent Belcher filed with the public service commission of Washington a petition against appellant, alleging that appellant had overcharged the shipper for transportation services. A hearing was had by the commission, which resulted in an order made by it on March 28, 1918, ordering and directing the appellant, within thirty days from the service of the order, to refund and pay the respondent the sum of $11,173.77, with interest. Thereafter, April 6, 1918, appellant filed in the superior court of Thurston county its petition for a review of the order of the commission. A writ of review was issued, and respondent appeared pursuant to the writ and moved to quash the same upon the grounds: (a) That there was no provision in the law for a review of an order for the payment of an overcharge such as was made by the public service commission in the proceeding before it; (b) that § 86, ch. 117, Laws of 1911, p. 596 (Rem. Code, § 8626-86), by its terms provided for a review by the courts only of orders made by the commission relating to rates, service, and facilities; (c) that the relator had a plain, speedy, and adequate remedy at law as provided in § 91, ch. 117, Laws of 1911, p. 600 (Id., § 8626-91).

The public service commission appeared and filed a return in the lower court, which return not being material to the consideration of the question presented here, has, by stipulation, been omitted.

The trial court held that a writ of review would not lie under § 86, ch. 117, Laws of 1911, p. 596 (Rem. Code, § 8626-86), and that the only method by which such order could be assailed was in an action brought to recover the overcharge pursuant to § 91, ch. 117, Laws of 1911, p. 600 (Rem. Code, § 8626-91), and declined to pass upon any of the questions involved in a consider-

ation of the merits of the public service commission's order.

The record presents but one question, whether the order of reparation made by the commission is such as may be reviewed under § 86, ch. 117, Laws of 1911, p. 596, which provides:

"Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court." Rem. Code, § 8626-86.

In *State ex rel. Great Northern R. Co. v. Public Service Commission*, 76 Wash. 625, 137 Pac. 132, we said:

"Appellants argue that the words 'any order,' as used in § 86, should be interpreted to mean only final orders. This contention is disposed of in *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3, where it was held that the provisions of this section are so plain as to admit of no argument as to their meaning. The legislature has not limited the right of review to final orders, but has conferred that right, and fixed a limit within which it may be exercised, upon any order of the commission which is deemed contrary to law, 'for the purpose of having its reasonableness and lawfulness inquired into and determined.' That the legislature has a right to provide for the review of any order must be admitted; and when it has in express terms done so, it is not for the courts to say that such review should be, not from any order as in the language of the act, but only from any final order. This would mean a judicial amendment of

the act which, doubting our power, we are not disposed to make."

It is claimed that § 86, *supra,* relates only to such orders by the commission as have to do with rates, service or facilities which affect future operations and the public, and that § 91 of the same act excepts proceedings for reparation from the right of review given by § 86, *supra.* There is no express exception in either of these statutes, nor can we make such an amendment. An exception is not to be presumed unless it is necessary to reconcile conflicting provisions. We cannot find any conflict in these statutes. Again, we are constrained to hold that the legislature, in using the words "any order," meant all orders, unless they had specifically excepted therefrom certain orders or class of orders in the foregoing statutes. The trial court was of the opinion that appellant could properly urge his contentions brought in the review proceedings when the shipper brought suit to recover the amount awarded by the order of the commission, and that the appellant had a plain and adequate remedy at law. Be that as it may, the legislature has provided that any complainant or any public service company affected by *any order* of the commission may apply to the superior court for a writ of review for the purpose of having the reasonableness and lawfulness of the commission's order inquired into and determined. Certainly appellant does not need to wait until the shipper sues under § 91 of the act, Rem. Code, § 8626-91, and have the findings and order of the commission declared *prima facie* evidence of the facts therein stated.

Being of opinion that the trial court erred, the judgment is reversed, with direction to overrule the motion to quash the writ of review, and proceed.

MOUNT, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14650. Department Two. June 19, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JENNIE GREENWALD, *Appellant*.[1]

CRIMINAL LAW — APPEAL — FAILURE TO PROSECUTE — DILIGENCE. Where an appeal from a conviction in justice court was perfected in February, 1916, and not brought to trial for over a year, it is properly dismissed for want of diligence in prosecuting it.

SAME—APPEAL—RECORD. Proceedings not made a part of the record in a criminal appeal cannot be considered.

Appeal from an order of the superior court for King county, Smith, J., entered April 6, 1917, dismissing an appeal from a conviction in a justice court, for want of diligence. Affirmed.

W. F. Van Ruff, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

PER CURIAM.—On December 14, 1915, the appellant, Jennie Greenwald, was convicted in justice court for King county of the crime of selling intoxicating liquor without a license. She took an appeal to the superior court. The transcript on appeal was filed on the 7th day of February, 1916. On the 23d day of March, 1917, the prosecuting attorney of King county filed a motion to dismiss the appeal for the want of prosecution. The motion was granted.

We are not favored by a statement of facts, and being bound by the record as it is revealed in the transcript, the case falls squarely within, and is controlled by, *State v. Buffum*, 94 Wash. 25, 161 Pac. 832. Appellant insists that the court abused its discretion in dismissing the case for the reason that, prior to the time the motion to dismiss was filed by the prosecuting attorney,

[1]Reported in 173 Pac. 636.

appellant had moved that the case be set down for trial. These proceedings are not made a part of the record and cannot be now considered.

Affirmed.

[No. 14116. *En Banc.* June 19, 1918.]

GRAYS HARBOR COMMERCIAL COMPANY, *Appellant*, v. TAKU CANNING & COLD STORAGE COMPANY, *Respondent*.[1]

BROKERS—AUTHORITY—PAYMENT—EVIDENCE—SUFFICIENCY. Payment to brokers for box shooks ordered through them, is authorized where previous orders had been paid for in that way, and upon demand for payment, the buyers wrote that it had been mutually agreed that they might not be able to pay promptly and that they anticipated paying in the manner previously pursued, and the seller replied that that would be satisfactory.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 3, 1917, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Alexander & Bundy, for appellant.

Farrell, Kane & Stratton, for respondent.

MOUNT, J.—This action was brought to recover an alleged balance of $2,500 and interest, alleged to be due from the defendant upon the purchase of twelve carloads of box shooks furnished by the plaintiff to the defendant in the year 1915. The defendant denied any balance due. The case was tried to the court without a jury, and resulted in a judgment in favor of the defendant. The plaintiff has appealed.

The material facts are not disputed. It appears that, in the year 1914, the respondent purchased some box shooks from the appellant through the States Lumber

[1]Reported in 173 Pac. 434.

Company, which was a brokerage concern managed by a Mr. Butterfield and a Mr. Randolph. That order was given by the respondent to the States Lumber Company, and that company ordered the shooks from the appellant. The shooks were shipped directly to the respondent, but were billed to the States Lumber Company. These shooks were paid for by the respondent to the States Lumber Company. Afterwards, in the year 1915, the respondent again ordered box shooks from the States Lumber Company. The order was placed by that company with the appellant, and the shooks were billed and shipped directly to the respondent. Thereafter, in May, 1915, the appellant wrote a letter to the respondent as follows:

"Taku Canning & Storage Co., May 19, 1915.
"Seattle, Washington.

"Gentlemen: We beg to again call your attention to your account amounting to $5,875 covering twelve carloads of box shooks, shipped between Feb. 26th and March 10th.

"You will note that all of these shipments are more than 60 days old, and we would thank you for the freight bills, and at least a remittance on account.

"Yours truly,
"Grays Harbor Commercial Company."

Upon receipt of this letter, respondent answered the same as follows:

"Taku Harbor, Alaska, June 1, 1915.
"Grays Harbor Commercial Co.,
"Cosmopolis, Wash.

"Gentlemen: We are in receipt of your letter of the 19th ultimo, and would advise that we will mail you the freight bills covering shooks we received, in a few days, expecting duplicates from the railroad company at Seattle in every mail.

"As to the payment of this account, when we placed the order with the States Lumber Co., it was mutually understood that we might not be able to pay the account promptly and it was satisfactory to Mr. Ran-

dolph and Mr. Butterfield at that time. We had anticipated taking care of same in the manner that we pursued last season, which was apparently agreeable to all concerned. At this writing we anticipate making you a substantial payment to apply on account, some time during the present month.

"Trusting that this arrangement will be agreeable to you, we remain, Yours truly,

"Taku Canning & Cold Storage Co."

In answer to this letter, the appellant wrote the respondent as follows:

"June 7, 1915.

"Taku Canning & Cold Storage Co.,
"Maynard Building, Seattle.

"Gentlemen: We beg to acknowledge receipt of your favor of June 1st and would advise that the handling of the account as outlined will be satisfactory to us.

"Yours very truly,
"Grays Harbor Commercial Company."

Thereafter, on July 7, 1915, the respondent paid $2,500 to the States Lumber Company to apply upon the purchase of these shooks. The States Lumber Company did not notify the appellant of this payment, and afterwards, on August 21, appellant wired respondent, asking when it could expect a remittance as promised in respondent's letter of June 1, above quoted. Thereupon respondent notified appellant of the $2,500 payment and, on August 28, mailed to appellant its check for $2,920, the balance of the account. Thereafter this action was brought to recover $2,500 and interest from the respondent, with the result as above stated.

It is contended by the appellant that the States Lumber Company had no authority to collect this money, and that the respondent was not authorized to make the payment of $2,500 to the States Lumber Company. This is the principal point upon the appeal. It is not contended, as we understand the record, that the re-

spondent was notified prior to August 21 that payment should not be made to the States Lumber Company. On June 1, when demand was made upon the respondent for a remittance upon the account, the respondent stated to the appellant that, when the order was placed with the States Lumber Company,

"It was mutually understood that we might not be able to pay the account promptly and it was satisfactory to Mr. Randolph and Mr. Butterfield at that time. We had anticipated taking care of same in the manner that we pursued last season, which was apparently agreeable to all concerned. At this writing we anticipate making you a substantial payment to apply on account, some time during the present month."

In answer to this letter the appellant stated "that the handling of the account as outlined will be satisfactory to us."

In the absence of any notice to the respondent from the appellant that payment should not be made to the States Lumber Company, we think, under the statement in the letter of June 7, above quoted, that the respondent was authorized to make the payment to the States Lumber Company, through which the order was given. Respondent had, the year previous, paid its account to the States Lumber Company. This order was placed by the States Lumber Company, which was a brokerage concern receiving orders of this character. It had received and placed the order the year before, and payment had been made through it. The shipment of the year before was billed to the States Lumber Company, but the goods were forwarded directly by the appellant to the respondent and duplicate shipping bills were issued. The order of 1915 was placed by the States Lumber Company, and the goods were billed and shipped direct from the appellant to the respondent, but the respondent received duplicate

shipping bills, one from the appellant, and the other from the States Lumber Company. So far as the respondent was concerned, there is nothing to show that it knew of any changed condition from the year previous. It had a right, therefore, to rely upon the letter of June 7, where it was advised that the handling of the account as outlined would be satisfactory. The account was handled in that way, and respondent made the $2,500 payment as it had done before. If the appellant did not desire the payments to be made through the States Lumber Company, as previously done, it should have notified the respondent in its letter of June 7 that payments should be made directly to the appellant and not through the States Lumber Company.

In the case of *Bronson's Executor v. Chappell,* 79 U. S. 681, it was said:

"Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition, or acquiescence, by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The infer-

ence to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same."

In answer to the letter of June 1, written by the respondent to the appellant, the respondent stated:

"We had anticipated taking care of the same in the manner that we pursued last season, which was apparently agreeable to all concerned."

The appellant then stated that "the handling of the account as outlined will be satisfactory to us," without notifying the respondent that payment should be made directly to the appellant and not to the States Lumber Company. The respondent would understand from this letter that the method pursued the previous season would be satisfactory. That season the respondent paid the bill to the States Lumber Company, which took and filled the order, and under these letters respondent was justified in assuming that payment might be made the same as it was at that time. It was made in that way, and we think the appellant ought not now be heard to say that the agent had no authority to receive the money. For this reason, we are satisfied the trial court properly found in favor of the respondent.

The judgment is affirmed.

MAIN, C. J., MITCHELL, HOLCOMB, PARKER, MACKINTOSH, FULLERTON, and TOLMAN, JJ., concur.

[No. 14819. Department One. June 19, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Alfred H. Lundin, Prosecuting Attorney etc., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Defendant.*[1]

CRIMINAL LAW—SENTENCE—POWER TO SUSPEND—STATUTES. Under Rem. Code, § 2280, authorizing suspension of sentence upon the conviction of a minor, and Id., § 2190, making it the mandatory duty of the court to pronounce sentence after verdict of guilty or finding against the defendant, the superior court has no power to suspend sentence upon a plea of guilty by an adult.

MANDAMUS—WHEN LIES—TO COURTS—SCOPE OF RELIEF—CRIMINAL LAW—SENTENCE. Mandamus will not issue to compel the superior court to pronounce sentence upon a plea of guilty while the accused has the right at any time prior to final judgment to ask leave to withdraw the plea, under Rem. Code, § 2111, or to move in arrest of judgment under Id., § 2183.

SAME. Mandamus lies to compel the superior court to proceed to final judgment upon a plea of guilty in a criminal case, upon suspending sentence without authority; since its action was a refusal to proceed to final judgment, rather than the mere commission of error.

Application filed in the supreme court April 24, 1918, for a writ of mandamus to compel the superior court for King county, Jurey, J., to render final judgment and sentence against a defendant upon a plea of guilty. Granted.

Alfred H. Lundin and *Everett C. Ellis*, for relator.

Morris & Shipley, for respondent.

PARKER, J.—The relator seeks a writ of mandate from this court commanding the superior court for King county and Honorable John S. Jurey, the judge thereof, to cause Fred Percy Rowell to be arrested and brought into that court for sentence upon his plea of

[1]Reported in 174 Pac. 473.

guilty to a charge of having committed the crime of bigamy; and commanding the court and the judge thereof to render final judgment and sentence against Rowell upon his plea of guilty.

On January 18, 1918, the prosecuting attorney for King county filed in the superior court for that county an information charging Rowell with the crime of bigamy. On March 12, Rowell, being duly arraigned in that court, Judge Jurey presiding, pleaded guilty to the charge as made in the information. Judge Jurey, having taken under advisement the matter of rendering judgment upon Rowell's plea of guilty, on March 15, entered an order suspending the rendering of judgment and sentence against Rowell indefinitely, and releasing him from custody upon his personal recognizance. This disposition of the case by Judge Jurey was made upon his own motion, and was rested upon the ground that the information did not state facts constituting the crime of bigamy, and also upon the ground that facts stated and conceded to be true by both Rowell and counsel for the state in open court at the time he pleaded guilty showed that he was not guilty of the crime of bigamy within the meaning of the statute defining that crime. We proceed upon the assumption, as counsel for both sides do in their argument, that Rowell was past twenty-one years of age at the time of committing the acts charged in the information. No motion was made in the superior court in Rowell's behalf for an arrest of judgment, nor has he as yet asked to withdraw his plea of guilty and substitute another plea therefor.

The principal contention here made in relator's behalf is that neither the superior court nor a judge thereof has any authority to suspend judgment and sentence indefinitely upon a verdict or plea of guilty establishing the guilt of an accused in a criminal prose-

cution, except in cases where the accused is under the age of twenty-one years. We feel constrained to sustain this contention, though, as we shall presently notice, this view of the law will not entitle the relator to relief to the extent prayed for in this proceeding.

We have no statute authorizing the suspension of judgment and sentence after conviction by verdict or a plea of guilty, other than § 2280, Rem. Code, which has reference only to convicted minors. Section 2190, Rem. Code, makes it the mandatory duty of the court to pronounce judgment and sentence in other cases as follows:

"After verdict of guilty or finding of the court against the defendant, if the judgment be not arrested or a new trial granted, the court must pronounce judgment."

It is true that this section does not in terms refer to a plea of guilty, but it is elementary that a plea of guilty has the same effect in law as a verdict of guilty, except that it may be withdrawn and another plea substituted therefor by leave of the court at any time before the rendering of final judgment and sentence thereon. 12 Cyc. 353; 8 R. C. L. 115. But, aside from these statutory provisions which negative the view that our superior courts have the power to suspend sentence indefinitely after conviction by the verdict of a jury or by a plea of guilty, we think the law is, in the absence of statute, that courts do not have the inherent authority to suspend sentence indefinitely, nor did they ever possess any such power at common law. This subject was learnedly reviewed by Chief Justice White, speaking for the supreme court of the United States in *Ex parte United States,* 242 U. S. 27, Ann. Cas. 1917B 355, L. R. A. 1917E 1178. Answering the contention that the courts possess inherent power to suspend sentence or the execution thereof, the learned Chief Justice said:

"Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

"The proposition might well be left with the demonstration which results from these considerations, but the disregard of the constitution which would result from sustaining the proposition is made if possible plainer by considering that, if it be the plain legislative command fixing the specific punishment for crime is subject to be permanently set aside by an implied judicial power upon consideration extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."

Answering the contention that this was a power exercised under the common law, the Chief Justice further observed:

"While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that at common law the courts possessed or claimed the right which is here insisted upon."

This view of the law plainly calls for a mandate from this court directing the superior court for King county and the judge thereof to set aside the order of March 15, 1918, indefinitely suspending sentence, and proceed to a final disposition of the state's prosecution of Rowell, pending in that court, in some manner other than by a suspension of judgment and sentence.

In view of the present status of that pending prosecution, it seems quite plain to us that we should not now direct by mandate that court to render final judgment and sentence against Rowell upon his plea of guilty. Final judgment not having been rendered against him, he still has the right to present to the court, and have determined by it, before final judgment, at least two questions, the decision of either of which in his favor would prevent the rendering of a judgment and sentence against him upon his plea of guilty. Section 2111, Rem. Code, reads as follows:

"At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted."

Manifestly, Rowell still has the right to request of the court the privilege of withdrawing his plea of guilty and substitute another plea in place thereof, and, of

course, if such request be made by him, has the right to have that question passed upon by the court before final judgment. Section 2183, Rem. Code, reads as follows:

"Judgment may be arrested on the motion of the defendant for the following causes:

"(1) No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court;

"(2) That the facts as stated in the indictment or information do not constitute a crime or misdemeanor."

It seems equally plain that Rowell still has the right to make a motion of this nature and have it decided by the court, since final judgment has not been rendered against him upon his plea of guilty. *State v. George,* 79 Wash. 262, 140 Pac. 337. Section 2184, Rem. Code, reads as follows:

"The court may also, on its views of any of these defects, arrest the judgment without motion."

This plainly refers to the defects mentioned in § 2183 above quoted, so the arresting of judgment, even upon the court's own motion, is a power which the court may exercise before the rendition of final judgment. These considerations render it plain that the state's prosecution has not proceeded to that stage where this court can say that the only duty left to the superior court is that of pronouncing final judgment and sentence, and manifestly we would, in no event, mandamus the superior court to pronounce final judgment until it was rendered certain that no other duty was left to it to perform in the case.

We may assume that there is not now pending in the superior court any motion in Rowell's behalf to arrest judgment upon his plea of guilty, nor any application to withdraw his plea of guilty and substitute an-

other plea, and we may even assume that the superior court is not of its own motion considering the question of arresting judgment; but we are to remember that final judgment has not been rendered, and that these questions may, in the manner provided by law, come before the court for its decision before judgment is rendered. If so, they will be for the superior court to decide without interference from this court, except as the superior court's decision thereon may be thereafter reviewable in this court. In *Ex parte United States,* above quoted from, a mandate was issued from the Federal supreme court to a Federal district court requiring the execution of a judgment and sentence. That prosecution had proceeded, however, in the district court to conviction, and, also, to final judgment, and it was the suspension of the execution of the judgment by the district court that was in question, rather than the suspension of the rendition of a judgment. Plainly, in that case, there was nothing left for the court to do but carry into execution its judgment. Had this prosecution proceeded to final judgment, as in that case, so that there would be no room for the superior court to consider any question before performing its final duty in the case, we could lawfully command it to perform such duty. This prosecution has not reached that stage; hence we can only command the superior court to proceed to a final disposition of the case, leaving it free to decide all questions properly before it before rendering final judgment.

That mandamus is the proper remedy to correct the action of the superior court, we think is plain, since its action here sought to be corrected is a refusal to proceed to final judgment, rather than the mere commission of error. *State ex rel. Martin v. Superior Court,* 101 Wash. 81, 172 Pac. 257. Some contention is made in behalf of the superior court that mandamus

is not the proper remedy because subd. 7, § 1716, Rem. Code, expressly provides for an appeal from a decision of the superior court setting aside an indictment or information, or arresting judgment on the ground that the facts stated in the indictment or information do not constitute a crime, and that its suspension of sentence was in effect an arrest of judgment as provided by §§ 2183, 2184, Rem. Code, above quoted, since it decided that the information did not state facts constituting a crime. But this was not the only ground of the court's order. Besides, the court did not arrest judgment in the sense that it finally disposed of the prosecution as charged in the information before it, but merely suspended sentence, leaving the prosecution undisposed of, and refused to proceed further.

We conclude that relator is entitled to a writ of mandate from this court commanding the superior court for King county and Honorable John S. Jurey, the judge thereof, to set aside the order entered on March 15, 1918, suspending sentence, and proceed to a final disposition of the case other than by a suspension of judgment and sentence.

It is so ordered.

MOUNT and FULLERTON, JJ., concur.

[No. 14574. Department One. June 20, 1918.]

PIONEER SAND & GRAVEL COMPANY, *Respondent*, v. SEATTLE CONSTRUCTION & DRY DOCK COMPANY, *Appellant*.[1]

DEEDS—GRANT OF EASEMENT—AFTER-ACQUIRED TITLE — STATUTES. A duly acknowledged contract between parties in possession of tide lands with preference right to purchase, granting easement for a waterway, is a deed, within Rem. Code, § 8765, providing that, where any person shall convey by deed any lands without having title, his after-acquired title shall inure to the benefit of the grantee, and thereafter run with the land; and the omission of the word "heirs" is immaterial, under Id., § 8753, dispensing with all such terms in conveyances.

NAVIGABLE WATERS—CONTRACTS—WATERWAYS. An agreement between adjoining owners of tide lands for a waterway, "each party to keep open, maintain and use" its half, is the grant of a cross-easement of a positive and negative character, the word "use" being intended to require each party to dock its vessels upon its own side, rather than to forbid its use of the whole waterway for passage.

EASEMENTS—APPURTENANCES. Easements in gross are not favored, the strong presumption being that they are appurtenant.

COVENANTS—RUNNING WITH LAND—EASEMENTS — ENFORCEMENT — EQUITY. A contract granting an easement in a strip of tide lands to be kept open as a waterway for the passage of water craft is a covenant running with the land, or at least one that will be enforced in equity against parties with notice.

VENDOR AND PURCHASER—CONSTRUCTIVE NOTICE—RECORD—CHAIN OF TITLE. Constructive notice of a contract creating an easement in tide lands for a passageway for water craft is given by recording the contract, after the parties' title thereto had become vested by their applications to purchase under their preference rights, they then being in possession.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered August 10, 1917, in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

[1]Reported in 173 Pac. 508.

Bogle, Graves, Merritt & Bogle, for appellant.

W. H. White, Charles E. Patterson, and *Tom S. Patterson,* for respondent.

TOLMAN, J.—This action is brought by the respondent, the owner of certain tide lands, to enjoin the appellant, the owner of adjoining tide lands, from improving such adjoining lands by piling and planking the same, and to require the appellant to remove certain piling, buildings, and structures already placed thereon by the appellant.

The respondent's action is based upon its contention that it is the owner of an easement on the strip of appellant's tide lands, thirty-three feet in width, adjoining the south line of respondent's lands, and extending easterly from the inner harbor line approximately two hundred and sixty feet.

Prior to March 25, 1890, an attempt was made to lay out and plat an addition to the city of Seattle known as Dearborn's second addition, which plat designated a strip of said tide lands as Charles street, which so-called street extended westerly from Commercial street, now First avenue south, to the deep water of Elliott bay, the center line thereof being approximately coincident with the north line of the strip thirty-three feet wide owned by the appellant, and upon which respondent claims an easement by virtue of the agreement hereinafter set forth.

On February 11, 1895, the plat of the Seattle tide lands, including the lands involved in this action, made by the tide land appraisers of King county, was filed in the office of the auditor of King county. And on the 15th day of March, 1895, the official plat of said tide lands was filed in the office of the board of state land commissioners at Olympia.

The respondent's claim is based upon a written agreement entered into on March 13, 1895, and recorded in the office of the county auditor of King county, Washington, on May 29, 1895. At the time said agreement was made, neither of the parties thereto had any title to the lands involved, except that they were in possession, had made valuable improvements, and claimed to have, and had, a preference right of purchase as given by the statute. The contract referred to, upon which respondent bases its rights, is as follows:

"This contract, made and entered into this 13th day of March, A. D. 1895, by and between the Seattle Dry Dock and Ship Building Company, a corporation organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business at Seattle, the party of the first part, and the Allen & Nelson Land Company, a copartnership doing business in Seattle, King county, Washington, the party of the second part,

"Witnesseth: That whereas, There was laid out upon the tide lands in the city of Seattle a certain so-called addition to said city, designated as Dearborn's Second addition, upon which there was laid out and platted a certain street called Charles street, which was produced westward to the deep water of Elliott Bay, which said Charles street has not been platted or recognized as a street upon the map recently filed of said tide lands by the tide land appraisers of King county, Washington, and

"Whereas, A portion of the lands included within said Charles street, as platted upon said Dearborn's Second addition, has been improved and used as a private way by the parties hereto, said portion so improved being bounded and described as follows, to wit: Commencing at a point 50 feet west of a point 1,495 feet south of the intersection of the center lines of Commercial and Jackson streets in said city of Seattle, running thence west 668.918 feet, thence south 66 feet, thence east 668.918 feet, thence north 66 feet to the

place of beginning; and by the improvement of said last described tract and of the tide lands to the north and south of the same said parties have the preference right to purchase from the state of Washington all of said lands above described, and

"Whereas, It is deemed for the best interests of both the parties hereto that said lands above described shall be purchased and a portion thereof occupied by the parties hereto in the proportions and upon the terms, conditions and agreements hereinafter contained:

"Now, therefore, it is hereby agreed:

"(1) That said party of the first part shall make application for, and in case said application is allowed, will purchase from the state of Washington the following described portion of the lands hereinbefore described, to wit: Commencing at a point 468.918 feet west of a point 1,528 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, running thence west 250 feet, thence south 33 feet, thence east 250 feet, thence north 33 feet to the place of beginning.

"(2) Said party of the second part shall make application for, and in case said application is allowed, will purchase from the state of Washington the following described portion of the lands hereinbefore described, to wit: Commencing at a point 50 feet west of a point 1,495 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, running thence west 668.918 feet, thence south 33 feet, thence east 430 feet, thence south 33 feet, thence east 238.918 feet, thence north 66 feet to the place of beginning.

"(3) It is agreed by and between the parties hereto that there shall be constructed upon the following portion of the lands hereinbefore described, to wit: Commencing at a point 50 feet west of a point 1,516 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, thence west 668.918 feet, thence south 24 feet, thence east 668.918 feet, thence north 24 feet to the place of beginning, a roadway, said roadway so constructed to be

a good, sufficient and substantial roadway, suitable for driving, draying and trucking and ordinary wagon traffic; all of said roadway to the west of the center line of Railroad avenue in the city of Seattle to be constructed as hereinbefore set forth by and at the expense of the party of the first part, and all of said roadway to the east of the center line of Railroad avenue in the city of Seattle to be constructed as hereinbefore set forth by and at the expense of the party of the second part; the parties hereto each to maintain the portion constructed by it or them as a good, sufficient and substantial roadway, suitable for driving, draying and trucking and ordinary wagon traffic, until Alaska street and Railroad avenue, on the official map of the tide land appraisers of King county, Washington shall be so opened and improved as to permit both of the parties hereto to obtain ready access to all lands they may purchase from the state of Washington contiguous to and abutting upon said roadway, or until some other street or streets to the north and eastward shall be opened, permitting said parties such access to said lands, and each of the parties hereto shall maintain and keep in repair the portion of said roadway hereinbefore agreed upon to be constructed by it or them, and both of the parties hereto shall have the right at all times until access to their lands be obtained in the manner hereinbefore set forth, to occupy and use the whole of said roadway for the purposes aforesaid, to wit: for draying, driving, trucking and ordinary wagon traffic.

"(4) It is expressly understood and agreed by and between the parties hereto that neither party shall be responsible to the other for damages resulting from any accident occurring to any third party or parties upon the respective portions of the roadway constructed and maintained by it or them.

"(5) Said party of the first part hereby assigns, transfers and sets over to said parties of the second part all its right, title, interest, and its preference right of purchase from the state of Washington of the following described lands, to wit: Commencing at a point 50 feet west of a point 1,495 feet south of the

intersection of the center lines of Commercial and Jackson streets in the city of Seattle, thence west to the inner line of the harbor rim, as shown upon the official map of the tide land appraisers of King county, Washington, thence south along said inner line of the harbor rim 17 degrees 14′ west 34.55 feet, thence east to the center line of Railroad avenue, thence south on the center line of Railroad avenue 33 feet, thence east 328.918 feet, thence north 66 feet to the place of beginning; and said parties of the second part hereby assign and set over to said party of the first part all their right, title, interest and preference right to purchase the following described lands, to wit: Commencing at a point on the center line of Railroad avenue 378.918 feet west of a point 1,528 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, running thence west to the inner line of the harbor rim as shown on the official map of the tide land appraisers of King county, Washington, thence south along said harbor rim 17 degrees, 14′ 15″ west 34.55 feet, thence east to the center line of Railroad avenue, thence north to the place of beginning.

"(6) It is further understood and agreed that in case the state shall permit such purchase, said party of the first part will purchase from the state of Washington the following described lands, to wit: Commencing at a point 718.918 feet west of a point 1,528 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, running thence west to the inner line of the harbor rim, thence south along said harbor rim 17 degrees, 14′, 15″ west 34.55 feet, thence east to a point 340 feet west of the center line of Railroad avenue, thence north to the place of beginning; and in case said state shall so permit, the parties of the second part will purchase from said state the following described lands, to wit: Commencing at a point 718.918 feet west of a point 1,495 feet south of the intersection of the center lines of Commercial and Jackson streets in the city of Seattle, thence west to the inner line of the harbor rim, thence south along said harbor rim 17 degrees 14′ 15″ west

34.55 feet, thence east to a point 340 feet west of the center line of Railroad avenue, thence north to the place of beginning; and said lands purchased by said parties as in this paragraph provided shall all be kept open and maintained by the parties hereto as a waterway for the accommodation of vessels, boats and other water craft, each party to keep open, maintain and have the use, for the purposes aforesaid, of the portion purchased by it or them.

"In witness whereof said party of the first part has caused these presents to be signed by its president and secretary, thereunto duly authorized, and its corporate name and seal to be hereunto attached, and said parties of the second part have hereunto set their hands and seals the day and year first above written.

"Seattle Dry Dock and Ship Building Company
"By Robert Moran, President
"Attest: Paul Moran, Secretary.
"Robert Abrams (Seal)
"Watson Allen (Seal)
"Allen & Nelson Land Co. (Seal)
"By J. B. C. Lockwood, Mgr. (Seal)
"J. Furth, Trustee."

The foregoing contract is duly acknowledged by all parties.

Following the execution of this contract, and on April 1, 1895, the Seattle Dry Dock & Ship Building Company made application to the state board of land commissioners to purchase the lands occupied by it, in accordance with the terms of said contract, title to which lands has since passed to and vested in the appellant. And on the same day, April 1, 1895, J. B. C. Lockwood, as trustee for all of the parties interested, made application to the state board of land commissioners to purchase the lands claimed and occupied by the parties of the second part therein, in accordance with the terms of the contract, title to which lands has since passed to, and is now vested in, the respondent. The state conveyed to it by deed the lands embraced

in the application of the Seattle Dry Dock & Ship Building Company, on July 25, 1899; and likewise conveyed by deed to J. B. C. Lockwood the lands embraced in his application, on January 23, 1900. The strip of land sixty-six feet wide, except the easterly end thereof, which appears to have been filled in by mutual consent, has at all times remained an open waterway until shortly before the bringing of this action, at which time the appellant entered upon that portion thereof, the title to which had vested in it, and began to drive piles, etc., with a view to permanently withdrawing that portion of the so-called waterway from use as such. Thereupon this action was brought to enjoin interference with such waterway, resulting in a decree recognizing the waterway as claimed by the respondent and permanently enjoining the appellant from interfering therewith, and requiring the appellant to remove its piling, etc., theretofore placed in said waterway, and every part thereof, excepting only the sixty-nine feet thereof which had been filled by mutual consent. From this decree, the appeal is taken.

The question to be determined in this case is whether the contract upon which respondent bases its rights because of its form and substance, and the fact that it was executed when neither party thereto had title to the real estate in question, was merely a personal contract, binding only upon the parties who executed it, and not now enforceable against the present owners, or whether, though the title was in the state at the time of its execution, it is a covenant running with the land, and the recording thereof was constructive notice to all subsequent purchasers and binding upon the appellant, or such a contract or covenant as equity will enforce.

We must assume that, at the time the contract was entered into, neither party had any vested right in the

lands claimed by it. *Allen v. Forrest,* 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.,* 35 Wash. 503, 77 Pac. 845. And no right would have then passed from them, or either of them, by deed. *Gifford v. Horton,* 54 Wash. 595, 103 Pac. 988. Also that their vested rights in said land began only with the applications to purchase from the state. *State ex rel. Billings v. Bridges,* 22 Wash. 64, 60 Pac. 70, 79 Am. St. 914. And yet, because of being in possession and having made valuable improvements, they each had a preference right to purchase, as recognized in all of these cases, which could be taken away only by act of the legislature. They were each in undisputed possession, had made valuable improvements, and contemplated taking steps to acquire full legal title, as is shown by the contract itself, and did, in fact, in accordance with the terms of the contract, proceed to acquire title in fee from the state. Why should not such after-acquired title, in law as well as in equity, be impressed with the terms of this contract?

The statute, Rem. Code, § 8765, then and now in force, provides:

"Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his or their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands, and to his or their heirs and assigns, and shall thereafter run with such land."

That this contract is in fact a grant of valuable rights in real estate, and, so far as it grants such rights, is a deed under this statute, we have little doubt. The omission of the word heirs, or other technical terms, does not in any way impair it, because our statute, Rem. Code, § 8753, dispenses with all such terms in conveyances.

The language in the latter part of the sixth paragraph of the contract: "And said lands purchased by said parties as in this paragraph provided shall all be kept open and maintained by the parties hereto as a waterway for the accommodation of vessels, boats and other water craft, each party to keep open, maintain, and have the use, for the purposes aforesaid, of the portion purchased by it or them;" would seem, in the light of the remainder of the contract, to express an intention to keep open this waterway, sixty-six feet in width, for the accommodation and passage of vessels and water craft. It cannot be assumed that it was the intention to observe an invisible line in the center of the waterway, so that each party should confine its use thereof to the thirty-three-foot portion to which each severally afterwards acquired title. The words "shall be kept open and maintained . . . as a waterway for the accommodation of vessels," indicates an intention to use the sixty-six-foot space as a whole for the passage of vessels; and the later clause indicates an intention to cast on each party the burden of keeping open and maintaining his half, and having the use thereof for purposes not inconsistent with the principal object of maintaining an open sixty-six-foot waterway for the passage of vessels. The word "use," as there employed, it would seem, was intended to require each party to dock its vessels upon its own side of the waterway, rather than to forbid it to use the whole waterway in bringing in and taking out such vessels.

Such instrument appears to be both an agreement and a grant, and has the effect of creating cross-easements of a positive and negative character. Presumably it is both a benefit and a restriction to each party thereto.

The questions as to when covenants do or do not run with the land, and whether easements are appurtenant or in gross, were among the most abstruse and technical questions of the common law. And when one goes to the earlier cases, he meets confusion and conflict. Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land.

It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant.

Under the rule laid down in the more modern cases, we think the contract here in issue was a covenant running with the land. *Sexauer v. Wilson,* 136 Iowa 357, 113 N. W. 941, 14 L. R. A. (N. S.) 185; *McCoy v. Chicago, M. & St. P. R. Co.,* 176 Iowa 139, 155 N. W. 995; *Willets v. Langhaar,* 212 Mass. 573, 99 N. E. 466; *Weill v. Baldwin,* 64 Cal. 476, 2 Pac. 249; *Lidgerding v. Zignego,* 77 Minn. 421, 80 N. W. 360, 77 Am. St. 677; *Hatfield v. Hatfield,* 150 Ky. 788, 151 S. W. 3; 7 R. C. L. 1110, and cases there cited. At any rate, the contract appears to be such a covenant regulating or restricting the use of the land as will be enforced in equity, when the party acquiring title took with notice, whether it is technically a covenant running with the land or not. *Barrow v. Richard,* 8 Paige Ch. (N. Y.) 351, 35 Am. Dec. 713; *Equitable Life Assur. Soc. of United States v. Brennan,* 148 N. Y. 661, 43 N. E. 173; *Brewer v. Marshall,* 19 N. J. Eq. 537, 97 Am. Dec. 679; *Burbank v. Pillsbury,* 48 N. H. 475, 97 Am. Dec. 633;

Jewell v. Lee, 14 Allen 145, 92 Am. Dec. 744; *Willoughby v. Lawrence,* 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; *Kettle River R. Co. v. Eastern Ry. Co.,* 41 Minn. 461, 43 N. W. 469; *Peabody Heights Co. of Baltimore City v. Willson,* 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393; *American Strawboard Co. v. Haldeman Paper Co.,* 83 Fed. 619; *Bryan v. Grosse,* 155 Cal. 132, 99 Pac. 499.

In order to be binding upon the appellant, either in law or in equity, it must have had actual or constructive notice of the contract. There seems to be ample evidence in the record to show that the property was so laid out, improved, and used as to give actual notice to the appellant that it was in fact a waterway, and to put appellant upon inquiry as to how the waterway was established, and what respondent's rights therein might be. We prefer, however, to hold that the appellant had constructive notice. The contract was duly recorded in the office of the county auditor of King county, Washington, on May 29, 1895. The rights of the parties in the real estate involved became vested when they made application to the state board of land commissioners to purchase, or on April 1, 1895; and since they were then in possession, and especially in the light of our statute with reference to the conveyance of after-acquired interests, it seems to us that the appellant was bound by everything which appeared of record, at least back to the date of the making of the applications and the acquiring of the vested right in the real property, or April 1, 1895. If such a search had been made, the record of this contract would have been found.

The appellant seems to rely upon the case of *Peterson v. Sloss,* 39 Wash. 207, 81 Pac. 744. In that case, the court, while applying the correct rule of law applicable to the facts, appears to have lost sight of our

statute with reference to the conveying of an after-acquired title, and to have indulged in some expressions which seem to indicate that a conveyance made by a party before he acquires title to the property conveyed is without the chain of title, and the record thereof might not be constructive notice to persons dealing with the property. Of course, all such expressions in that opinion are obiter only, and no one should be misled thereby. It would seem to be necessary, in view of the statute referred to, for one to limit the search of the records only at his own peril. And assuredly he should be required to take notice of all instruments filed of record, executed by or on behalf of any person having preference rights or vested interests.

For the reasons given, the judgment of the lower court will be affirmed.

MAIN, C. J., FULLERTON, PARKER, and MITCHELL, JJ., concur.

[No. 14723. Department Two. June 20, 1918.]

EDMUND B. BENN, *Appellant*, v. GRAYS HARBOR COUNTY *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS — TAXATION — LEVY FOR INDEBTEDNESS — LIMITATIONS—STATUTES. Rem. Code, § 7653, relating to tax levies by cities of the second class and providing a limit only for levies for general purposes, was not intended to impliedly repeal, but must be taken *in pari materia* with, Rem. Code, § 5131, as originally enacted, and as amended subsequent to the passage of § 7653, and which fixes a limit for levies to pay outstanding indebtedness, in accordance with the harmonious policy of the laws respecting limitation upon the powers of all cities in this respect.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered January 26, 1918, upon sustaining a demurrer to the complaint, dis-

[1]Reported in 173 Pac. 632.

missing an action to enjoin the collection of a tax. Reversed.

C. A. Murray and *L. B. da Ponte,* for appellant.

Stewart & Tucker and *A. Emerson Cross,* for respondents.

HOLCOMB, J.—Aberdeen, a city of the second class, made a tax levy of 24.19 mills for the payment of outstanding current expense warrant indebtedness, with interest, for the year 1917, which was certified to the county auditor and spread upon the tax rolls of Grays Harbor county. This is an action by appellant, as a taxpayer, against the city of Aberdeen and Grays Harbor county, to enjoin the collection of 18.19 mills of such levy, amounting to the sum of $105,257.82, for the reason that the city is unauthorized to make a levy for such purposes in excess of six mills. A general demurrer to the complaint was sustained, and appellant declining to plead further, judgment of dismissal with prejudice was entered.

The sole question upon this appeal is whether the second class city of Aberdeen, a city having less than 20,000 inhabitants, is limited by law to a six-mill levy for the payment of outstanding current expense warrant indebtedness.

The legislature in 1907 passed chapter 241, relating to cities of the second class having less than 20,000 inhabitants, of which § 70, p. 666, relating to tax levies, is as follows:

"Tax Levies: Any such city shall have power through its council to levy and collect annually, a property tax for the payment of outstanding warrants and also for the purpose of providing funds for the payment of interest on, and for the creation of sinking funds for, all outstanding bonded indebtedness, and in addition thereto, such city shall have power to levy

and collect annual taxes for the payment of current expenses not exceeding fifteen mills on the dollar of assessed valuation: *Provided,* that if the qualified electors of said city at a special election to be held for that purpose should vote in favor of a larger levy for the payment of current expenses, than fifteen mills on the dollar of assessed valuation, a larger levy for said purpose may accordingly be made. All of the provisions of chapter 84 of the session Laws of 1897, so far as the same are not inconsistent herewith, shall be applicable to such cities." Laws 1907, p. 666, § 70; Rem. Code, § 7653.

In 1913, the legislature reenacted § 3, ch. 84, p. 222, Laws 1897, being § 5131, Rem. & Bal. Code, with an additional proviso. The title of the act and Rem. Code, § 5131, as amended, read as follows:

"An act relating to taxes in cities and towns and amending section 5131 of Remington & Ballinger's Annotated Codes and Statutes of Washington."

"§ 5131. Such municipal corporations shall levy and collect annually a property tax for the payment of current expenses, not exceeding ten mills on the dollar; *a tax for the payment of indebtedness (if any indebtedness exist) not exceeding six mills on the dollar,* and all moneys collected from the taxes levied for payment of current expenses shall be credited and applied by the treasurer to 'Current Expense Fund,' and all moneys collected from the taxes levied for the payment of indebtedness shall be credited and applied to a fund to be designated as the 'Indebtedness Fund': provided, that any such municipal corporation having at present an existing indebtedness it may levy and collect annually a property tax for the payment of current expenses, not exceeding fifteen mills on the dollar." Laws 1913, ch. 92, p. 274, § 1.

Appellant contends that this statute should apply, for it limits the levy to six mills, while § 7653, *supra,* provides no limit for outstanding warrant indebtedness. It is apparent that both these statutes are general in their nature and, if there is a conflict between

them, the one passed later in time should be given preference, for the legislature must be presumed to have passed it with knowledge of existing statutes. If § 7653, *supra*, does not provide a limit for the tax levy, and Rem. Code, § 5131, provides a limit, it cannot be said that there is a conflict.

The legislatures of 1907 and 1913 had before them all the existing statutory and charter limitations upon the powers of cities and towns of all classes to levy taxes for existing funded and unfunded indebtedness. Cities of the first class, by charter restrictions, and third and fourth-class cities and towns, by statutes, all have, and then had, express and positive limitations upon the power to levy taxes for such purposes. If the legislature of 1907 intended to abolish the limitation on tax levies for existing unfunded indebtedness in second-class cities, it did not expressly so declare. If it repealed such statutory limitation as to cities of the second class, it did so only by indirection and implication; and repeals by implication are not favored, save when statutes are clearly in conflict with prior statutes and such construction is necessary to give effect. *Meade v. French*, 4 Wash. 11, 29 Pac. 833; *State ex rel. Purves v. Moyer*, 17 Wash. 643, 50 Pac. 492; *State v. Binnard*, 21 Wash. 349, 58 Pac. 210; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91. It did change the then existing law as to the limit of levy for current expenses. If the legislature of 1907 abolished such limitation as to cities of the second class, leaving such limits upon the same kind of tax levies as to all other classes of cities and towns within its general legislative power reserved, except as to cities of the first class, it did a thing apparently repugnant to the general and long-continued legislative policy to fix limits upon such power in all cities and towns.

Consequently it cannot be logically presumed that, when the legislature of 1907 was legislating as to the general powers of cities of the second class, it intended to single them out in this sole particular and abrogate limitations that existed, and have continued to exist, as to all other cities and towns. To so presume would be to do violence to the wisdom and justice of the law-making body and the harmonious policy of the laws.

We are convinced that the legislature of 1907 intended the provisions of § 70, ch. 241, p. 666, to be considered *in pari materia* with § 3, ch. 84, Laws 1897, p. 222, with the limit there fixed upon the power of cities of the second class to levy taxes for existing unfunded indebtedness; and that the legislature of 1913 had the same intention in legislating upon the subject; that it has been the continuous legislative will to establish limits upon the power of cities and towns of all classes to levy taxes for such purpose, and so to be understood and construed.

We therefore conclude that the trial court erred in sustaining the demurrer to the complaint and dismissing the action.

Reversed.

MAIN, C. J., MOUNT, and MACKINTOSH, JJ., concur.

[No. 14747. Department Two. June 20, 1918.]

L. K. COGSWELL *et al.*, *Appellants*, v. L. C. BROWN *et al.*, *Respondents*.[1]

MORTGAGES—FORECLOSURE—REDEMPTION—RENTS AND PROFITS—ACCOUNTING. Under Rem. Code, § 594 *et seq.*, providing a method of redemption, but providing that one in possession shall account for rents and profits, one who demands an accounting from the sheriff within the period of redemption may maintain an action for an accounting, notwithstanding that he might have pursued an accounting through the sheriff.

SAME—REDEMPTION—DAMAGES FOR WASTE. Where plaintiffs, instead of redeeming at law from a mortgage foreclosure, seek an accounting in equity for rents and profits during the period of redemption, they cannot exact the penalty of treble damages provided by Id., §§ 939, 940, for waste in cutting timber, but must be satisfied with their actual damages.

SAME — REDEMPTION — ACCOUNTING FOR WASTE — SCOPE OF RELIEF. Where a part of the mortgaged premises bid in by the mortgagee was sold during the period of redemption to B. for a less sum than the amount due, and B. committed waste by the removal of the timber, upon an accounting to the redemptioner, the equities between B. and the mortgagee are to be adjusted by the decree.

Cross-appeals from a judgment of the superior court for Lewis county, Reynolds, J., entered November 12, 1917, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

Lockerby & Wright, for appellants.

Forney & Ponder, for respondents Brown.

W. E. Bishop and *A. E. Rice*, for respondents Kuchar *et al.*

CHADWICK, J.—Plaintiffs mortgaged a certain piece of timber land to defendant Kuchar. The mortgage was foreclosed and the property bid in by Kuchar for $2,387.90, the amount due with interest and costs.

[1]Reported in 173 Pac. 623.

Kuchar deeded to Fred Schellenberger, and he to defendant L. C. Brown. Brown was engaged in the logging business. He entered into possession of the land and denuded it of its merchantable timber. Within the period of redemption, plaintiffs filed a demand for an accounting with the sheriff, and thereafter brought this action to redeem, alleging the removal and sale of the timber and that Brown had realized the sum of $3,750. They prayed that they have accounting, that the mortgage debt be satisfied, and that they be given treble damages as for a willful trespass (Rem. Code, §§ 939, 940), or if the court should find the timber to be of less value, that they be entitled to pay the difference and take redemption.

The court found the value of the timber to be $2,300, granted a redemption if the difference were paid within fifteen days, but denied the treble damages as prayed for. Brown has appealed from that part of the decree allowing damages and redemption. Kuchar asks that the equities between him and Brown be adjusted; and plaintiffs have appealed from that part of the decree refusing treble damages. Brown's contention is, first, that there has been no redemption; that the statutory method of redemption is exclusive, and no tender of the amount found to be due on the foreclosure, with interest and costs, having been made and the time having now past, plaintiffs are without remedy, and that defendants should all go hence. It is true that the statute provides a method of redemption, Rem. Code, § 594 *et seq.*, but it provides that the one in possession shall account for the rents and profits. It would be idle to require a mortgagor to pay or tender the amount due when a purchaser at the sale had used the property to his own profit and was, in equity or at law, indebted to him in a sum far in excess of the amount due on the mortgage debt. It was formerly the rule, a practice

coming from the common law and grounded in the character of the title taken by the purchaser, that a purchaser was entitled to the rents, issues and profits of the land pending a redemption. *Hardy v. Herriott,* 11 Wash. 460, 39 Pac. 958; *Knipe v. Austin,* 13 Wash. 189, 43 Pac. 25, 44 Pac. 531.

But under our holdings that the legal title will not pass until after the period of redemption has expired and the execution of a sheriff's deed, the rule was inconsistent and the law readily adapted itself to the theory that one in possession should account. Laws 1899, p. 85, ch. 53. Defendants are in no way deprived of right or privilege by the present proceeding. True it is that plaintiffs might have pursued an accounting through the sheriff, but the actual satisfaction of the mortgage debt being the material thing, it was their privilege to ask an accounting where the fact as well as the law could be finally settled.

Defendant Brown insists that the removal of timber is neither "rents" nor "profits" within the meaning of the statute, and that no tender having been made, and the law providing for no accounting other than for "rents and profits," the bar of a fixed limitation intervenes to protect their title. Aside from the narrow construction which must be given to the statute to sustain this theory and which we would be loath to adopt, it seems that the law is ample to sustain the present action, although it be held that the removal of timber and its conversion is neither "rents" nor "profits." It is provided, Rem. Code, § 601, that the court may restrain waste during the period of redemption. If a court of equity will restrain waste—and the cutting of timber except for fuel and the repair of fences is waste (§ 601)—during the period of redemption, it would seem to follow that it would entertain a suit of the owner for an accounting if the action is

begun within the time for redemption. Equity will date its decrees, unless controlled by statute, as of a time when they will be effective to do equity, and under the doctrine of relation the decree, although entered thereafter, would operate as of the time the waste was committed.

We hold, therefore, that plaintiffs may maintain the action, but it does not follow that there is merit in their appeal. They have forsaken the law and appealed to equity; and appealing to equity, they must do equity. Their legal right was to redeem under the statute and within a certain time. They did not do so, but sought an accounting for waste. Their plea is one to which a court of equity will give ear, but to which a court of law will not listen. Such relief as they are entitled to is a matter of grace rather than of right, and as they demand equity, so must they take their recovery under the rules of equity. They demand the full measure of their damage and are content with the amount fixed by the court. They demand that that recovery be trebled, so that, asking grace, they demand a penalty. Penalties are not favored in the forum of conscience, and having passed the time of strict redemption, they must content themselves with the value of their property. They might have redeemed in money and in time and raised the present issue in a proper proceeding. They were content to become beseechers at the throne of grace and are entitled to the value of that which was taken, and no more. Their cup may be full, but it shall not be made to run over.

Counsel have filed briefs which learnedly discuss their theories. We have given them our earnest consideration and, after mature reflection, have concluded that it would be of no avail to discuss the cases cited, for, if our vision be not clouded, the case is quickly

resolved by reference to the statute and the elementary principles of equity.

When Kuchar foreclosed his mortgage, other property was included—the sale to Brown was of a part only of the property and, as we are told, for a less sum than the amount due under the decree. The equities between Brown and Kuchar are to be adjusted. The decree will be affirmed on both appeals, but the case will be remanded with instructions to define the rights and obligations of the Browns and Kuchar *inter sese*. Plaintiff may redeem, within fifteen days after the going down of the remittitur, by paying the amount due on the judgment, with interest, taxes paid and costs, less the sum of $2,300. Each appealing party will pay his own costs in this court. Costs in the court below will go as previously adjudged.

MAIN, C. J., MOUNT, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14775. Department Two. June 20, 1918.]

J. M. FARRELL, *Respondent*, v. C. A. MENTZER *et al.*, *Appellants*.[1]

TRUSTS—IN LAND—PAROL EVIDENCE—FRAUDS, STATUTE OF. The statute of frauds is an absolute provision that parol evidence is inadmissible to establish an express trust in real estate.

SAME—IN LAND—"EXPRESS TRUST." An express trust is created by the breach of an agreement whereby defendants agreed to purchase the assets of a bankrupt corporation at the trustee's sale for the joint benefit of the defendants and the plaintiff, who was a stockholder and had made a deposit to guarantee his bidding at the sale, the defendants having purchased at the sale and refused to perform their agreement to convey one-half to the plaintiff, whose deposit was returned to him; it appearing that the plaintiff's interest in the company was so slight as not to avail him anything.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 31, 1917, in

[1]Reported in 174 Pac. 482.

favor of the plaintiff, in an action for equitable relief, tried to the court. Reversed.

T. F. Mentzer and *Troy & Sturdevant,* for appellants.

Fred W. Dricken, John L. McGar, and *Hayden, Langhorne & Metzger,* for respondent.

MACKINTOSH, J.—Without determining that they have been proven by clear, cogent and convincing proof, we may assume that the facts in this case are as alleged in the respondent's complaint and contended for in his brief. The assets of a lumber company, of which the respondent was one of the stockholders, were in the hands of a trustee in bankruptcy, and the respondent, being desirous of purchasing these assets at the trustee's sale, had made a deposit to guarantee his bidding at that sale, and, a few days before the sale was to take place, interested the appellants, who were the owners of a considerable tract of timber land tributary to the mill, which had been previously operated by the bankrupt lumber company. These negotiations with the appellants resulted in an agreement that they would become jointly interested with the respondent in the purchase of the assets of the bankrupt company. All the parties agreed that the purchase was to be made by one Wright, who should bid in the property and take conveyance to himself, and then should transfer the property, half to respondent and half to appellants. In pursuance of this agreement, Wright bid in the property, and subsequently the trustee in bankruptcy deeded the property direct to the appellants for the purpose of saving the expense of a transfer to Wright and a retransfer from Wright to the appellants. After securing title, the appellants refused to transfer a one-half interest to the respondent. The amount which the respondent had deposited

to secure a public sale was returned to him. All of these transactions rested upon parol testimony, and it is the contention of the appellants that the trial court was in error in allowing parol testimony to be introduced, for the reason that the facts relied upon by the respondent established an express trust and, therefore, came within the operation of the statute of frauds. Respondent's position is that these facts do not make a case of express trust, but one of resulting or constructive trust which may be proved by parol.

There is much foundation for the contention of each of the parties to be found in the decisions of this court. The cases abound in the use of inexact terminology in order to avoid the rigor of the statute of frauds; and to accomplish a deserved result, the court has at times attempted to avoid the statute of frauds by holding that the facts of a particular case created some sort of a trust other than an express trust. The statute of frauds was intended to, and does in the overwhelming majority of cases, prevent fraud, but it is also true that, in its operation in some cases, it works an apparent injustice. This, however, does not furnish sufficient reason for courts in those few cases to attempt to take the facts out of the statute of frauds by attempting to distinguish them from cases which admittedly fall within the statute, when no such distinction can logically be made. As Judge Chadwick, speaking for the court, said in *Forland v. Boyum,* 53 Wash. 421, 102 Pac. 34, "the contract falls within the statute of frauds. Such contracts are held void by force of the statute, and the *rights of the parties can never be determined by resort to equitable principles.*" By no honest process of reasoning can the different decisions be harmonized or reconciled, and by no sophisticated reasoning should it be attempted to be done. We have drifted a considerable distance into the waters of con-

fusion and it is time to return to the moorings, which are these: that the statute of frauds is not an equitable doctrine, but is an absolute statute which provides, so far as the question under consideration here is concerned, that parol evidence is inadmissible to establish an express trust in real estate. It may be that a strict application of the statute in some cases will operate to defeat a just claim, but that is not a sufficient reason for attempting to remove those cases from the operation of the statute by misnaming the character of the trust involved.

It may be well to restate the fundamental characteristics of these varieties of trusts:

(1) Those trusts which are created by contract of the parties and intentionally. They are express trusts.

(2) Those created by operation of law, where the acts of the parties have no intentional reference to the existence of any trust. These trusts are (a) implied or resulting, (b) and constructive. Sections 987 and 1030, vol. 3, Pomeroy, Equity Jurisprudence.

Resulting trusts are defined by Pomeroy as follows:

"All true resulting trusts may be reduced to two general types: (1) Where there is a gift to A, but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. In order that a case of this kind may arise, there must be a true *gift* so far as the immediate transferee, A, is concerned; the instrument must not even state any consideration, and no valid complete trust must be declared in favor of A or of any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions.

"(2) Where the second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B." 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1031.

The same author defines constructive trusts as follows:

"Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. . . . The trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands." Id., § 1044.

Resulting and constructive trusts have been defined and classified in 39 Cyc., p. 26 *et seq.*, in this language:

"Implied trusts . . . are subdivided into the two classes, resulting and constructive. A resulting trust is a trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction. Such trusts are also called 'presumptive' trusts and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another, although they may result from other kinds of transactions. Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. They are also known as trusts *ex maleficio* or *ex delicto*. Resulting and constructive trusts while frequently confused, are clearly distinguishable. In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust, by reason of which, al-

though it is by no means an express trust, it approaches more nearly thereto. Constructive trusts on the other hand have none of the elements of an express trust, but arise entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention. They are entirely *in invitum,* and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud. Constructive trusts embrace a much larger class of cases than resulting trusts, their forms and varieties being said to be practically without limit."

A great deal of the confusion in the classification of trusts has arisen from the fact that some of the courts have mistakenly held that the breach of a contract constituted fraud, and have thereby attempted to convert the breach of an express contract which would have raised an express trust into a constructive trust created by fraud. The logical result of such confusion would be to hold that the breach of every express contract would be the establishment of a constructive trust, and thus entirely obliterate express trusts. This point is well covered by Pomeroy as follows:

"The foregoing cases should be carefully distinguished from those in which there is a *mere* verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; *there must be an element of positive fraud accompanying the promise,* and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1056.

"We cannot see why, if this evidence is to be received to establish this trust, every other deed in the state may not be shown by parol to have been given upon trust, and the statute of frauds be entirely annulled. . . .

"No actual fraud is alleged, found, or shown by the evidence. For all that appears to the contrary, Michael Feeney's deed may have been given and received in entire good faith. The mere failure to perform a parol agreement which was made in good faith is not fraud." *Feeney v. Howard,* 79 Cal. 525, 21 Pac. 984, 12 Am. St. 162, 4 L. R. A. 826.

In the case at bar, all that is contended for by the respondent is that a contract was entered into in good faith between himself and the appellants whereby they were to take title to property and hold one-half thereof for him, and that, after having acquired that title, they breached the contract by refusing to allow him his one-half interest. The only act that can be relied upon by him as fraudulent is the simple breach of a contract. This is not fraud within the requirements of a constructive trust. It amounts only to the breach of an express agreement which gives rise to an express trust. Bearing in mind these fundamental distinctions between express, resulting and constructive trusts, we will pass to an examination of the decisions of this court.

The case of *Rozell v. Vansyckle,* 11 Wash. 79, 39 Pac. 270, was one where the legal title to land had been transferred upon the parol promise of the grantee, made in bad faith and with intent to deceive, that he would hold in trust for the grantor. It was properly held that the transaction did not come within the statute of frauds, as the trust was one arising from fraud, and therefore was a constructive trust subject to parol evidence.

In *Gottstein v. Wist*, 22 Wash. 581, 61 Pac. 715, it was held that an agreement by a mother, made upon consideration, to hold lands then in her name in trust for her children constituted an express trust, and that oral evidence was admissible, in an action begun by a creditor to set aside the conveyance by the mother to her children in fulfillment of the trust, to show that the property had been held by the mother under an express parol trust. The court distinguishes that case from one such as this at bar by the fact that the court was then considering an express trust which had already been entirely executed.

Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305, one of the cases principally relied upon by the respondent, was an action wherein a daughter had advanced the purchase price to be paid for certain land which was purchased by her parents, she taking a deed in her name under an oral agreement which provided, when the parents should repay her the purchase price, she would convey the land to them. She subsequently refused to deed the property in accordance with her agreement, and this action was instituted to compel that conveyance. The court granted the relief prayed for, basing its decision upon the rule that, "when by verbal agreement the purchase money of real estate is paid by one person and the conveyance is made to another person, a resulting trust arises against the person to whom the land is conveyed in favor of the one by whom the purchase money was paid. The same rule arises when the money is merely advanced as a loan by the party taking the title." It further appeared in that case that the parents, relying upon the agreement, had purchased adjoining property and made expenditures thereon, and the court held that these were acts done in performance of the agreement and referable to that alone and thereby constituted

part performance, which created an equitable estoppel against the daughter to claim that the agreement was within the statute of frauds, the conclusion of the court being that the daughter was estopped to urge the statute of frauds, and that she occupied the position of being the trustee of a resulting trust and a mortgagee. That case was correctly decided, for the reason that there had been a part performance of an express trust by the *cestui que trust* which took the case from the operation of the statute of frauds. The statement in the opinion is correct that a resulting trust arises in the nature of a mortgage where the purchaser takes title as security for an actual loan made to the *cestui que trust,* who is bound by an absolute promise and obligation to repay. The court went far in this case in intimating that there was the relation of debtor and creditor existing between the trustee and her parents. The court was correct in stating that a resulting trust arises where the money is paid by one person and the title is taken by another, but the court was in error if the decision is taken as stating that such a trust arises when title is taken by the one paying the purchase price on an agreement to convey to another upon being reimbursed. In the case at bar, there was no part performance which would take the case out of the statute of frauds, nor did the respondent pay for the purchase of his share of the property to which the appellants took title, nor did the appellants take title as security for money loaned to the respondent.

Another case relied upon by the respondent is *Peterson v. Hicks,* 43 Wash. 412, 86 Pac. 634, being a case where the plaintiff entered into an oral agreement with the defendant, who was to advance the purchase price of property and take title and to give a bond for a deed in consideration of the amount advanced by him plus a bonus. The plaintiff took possession and made im-

provements and repairs. The court held that there had been such a part performance of the oral agreement as to take the case out of the operation of the statute of frauds. It is true that, in the course of the opinion, the court said that, even if there had been no part performance, "still a constructive trust would arise in his favor which would be excepted from the operation of the statute." This language is obiter, and in addition misstates the law upon this subject, for the reason that the fraud that is necessary to create a constructive trust is not, as we have already stated, a mere refusal to comply with the terms of the contract. The decision can be sustained on the doctrine of part performance of an express trust, but is not authority on the question of constructive trusts.

The case of *Frost v. Perfield,* 44 Wash. 185, 87 Pac. 117, presents a case of constructive trust arising from the actual fraud of an agent in purchasing property for his own use and benefit, having been trusted by his principals to bid in the property as their agent. Here was a trust founded upon fraud and contrary to the intention of the parties.

Holly Street Land Co. v. Beyer, 48 Wash. 422, 93 Pac. 1065, recognizes that a trust in real property cannot be proven by parol, but held that the facts in that case showed that the holder of the property became possessed of it by paying the amount claimed by one asserting title adverse to the then occupant of the land, and that he took a quitclaim deed in his own name merely as a matter of convenience. It appears that the advancement made by the appellant was made as a gift or in satisfaction of some obligation which the appellant owed to the respondent which would constitute a resulting trust, for the transaction amounted to the payment by the *cestui que trust* and the taking of the title in the name of the trustee.

A case relied upon by the appellants is that of *Spaulding v. Collins,* 51 Wash. 488, 99 Pac. 306, which was a case where a husband and wife conveyed premises in which they lived to Collins under a verbal agreement that he would redeem the same from a mortgagee and hold them in trust for the use of the wife until the sum advanced had been repaid. The court held that this was an express and not a resulting trust and that oral evidence was inadmissible to establish it, and held that, in such a case, continued possession of the property by the *cestui que trust* for twenty years after the execution of the deed, by consent of Collins, was not such a part performance as to take the case out of the statute of frauds. This is a well considered case in which Judge Mount refers to the cases of *Holly Street Land Co. v. Beyer, Borrow v. Borrow* and *Peterson v. Hicks, supra,* and said "the deed in this case cannot be considered as a mortgage by reason of the fact that there never was any duty owing by either of the appellants to the grantee, nor was there any obligation by the appellants or either of them to pay any advances made by the grantee . . . a trust, if any exists, is an express trust and cannot be proven by parol."

Cushing v. Heuston, 53 Wash. 379, 102 Pac. 29, in addition to holding that a resulting or constructive trust upon the holder of real property will not be founded upon a conflict of parol testimony if there is any doubt in regard to it, holds, after quoting section 1056, vol. 3, Pomeroy's Equity Jurisprudence, that a constructive trust does not arise from a verbal promise by the purchaser of one of several lots to attend to the matter of acquiring title to abutting tide lands for the benefit of the purchasers of other lots in the same block, when the promisor had no funds or property in his hands belonging to the others and none was fur-

nished and he did not agree to advance any for the contemplated purchase, and he was not to receive any compensation for the voluntary service, and in acquiring a deed for himself, the grantors of the tide lands were not concerned as to what parties were to be benefited by the purchase, notwithstanding that it was represented that the purchaser was acting for the benefit of himself and neighbors.

It was held that an express trust could not be proven by parol in the case of *Pilcher v. Lotzgesell,* 57 Wash. 471, 107 Pac. 340. Here it was claimed by the appellants that the will made by their mother was ineffectual as to them, they not having been mentioned therein, and that there was an understanding at the time the will was made that the property willed by the mother to the father should be for the benefit of the children (appellants). It was held that there was no evidence in the case showing a trust of any nature, and the case is authority only to the point that the "strongest kind of proof must be adduced to establish a trust, and an express trust cannot be proven by parol testimony." This also is in effect the holding of the court in *Kinney v. McCall,* 57 Wash. 545, 107 Pac. 385. In *Harras v. Harras,* 60 Wash. 258, 110 Pac. 1058, the court held as follows:

"The authorities generally hold that, where one person verbally agrees to attend a judicial sale and purchase for the benefit of another who has a present interest in the land to be sold, the promisor will not be permitted to perpetrate a fraud by repudiating his agreement, but will be held a constructive trustee. The courts, with much unanimity, hold that a constructive trust will arise, and the promisor who buys the land at judicial sale will be decreed to hold the same for the benefit of the promisee, where there existed between them a confidential relation aside from that created by the agreement to purchase, where the promisee supplied a part of the purchase money, where the prom-

isee was lulled into inactivity by reason of the promise, and was prevented from protecting his rights in the land sold or refrained from doing so, where the promisor was enabled by reason of his agreement, to secure the land at a price materially below its actual value, or where persons interested in the land under the oral agreement remained in possession thereof and made valuable improvements. All of these conditions are shown to have prevailed in the case at bar, and we regard them as sufficient to sustain the trust declared by the trial court."

In the case at bar, it is not claimed that there existed between the parties any relation apart from that created by the agreement to purchase, or that the respondent supplied a part of the purchase money, or that the respondent was lulled into any inaction by reason of the promise of the appellants, or that he was prevented from protecting his rights, or that the appellant, by reason of the agreement, secured property at a price materially below its actual value, or that the respondent, under the oral agreement, remained in possession or made valuable improvements, which are all the acts held in *Harras v. Harras* to constitute a trust. The decision is out of line with the authorities, in so far as it intimates that the mere breach of an express contract to convey gives rise to a constructive trust.

In *Mayer v. Jacob,* 61 Wash. 291, 112 Pac. 361, the evidence established a trust where it showed that the plaintiffs and defendant agreed to buy the land in equal sums and the plaintiff paid $500 earnest money and the conveyance was taken in the name of the defendant, who immediately repudiated the contract, claiming that the money was a loan to him. A resulting trust was established by the payment by the plaintiff of his share of the purchase price.

The backbone of respondent's case consists of the case of *McSorley v. Bullock,* 62 Wash. 140, 113 Pac. 279. The facts in that case were these: A stock of goods belonging to a corporation which was in bankruptcy was to be sold by the receiver. The appellant had an interest in the corporation and the goods and was desirous of purchasing the same at the receiver's sale. He made an arrangement with the respondent to bid the same in for him and take the bill of sale for the respondent's security therein. The appellant was thereafter to repay the amount of money so advanced, together with a reasonable payment to the respondent for the money advanced and for his time in the matter. Under this agreement the respondent subsequently converted the goods to his own use. Under these facts, the court found that a constructive trust was established and that parol evidence was properly admissible in proof thereof. If we accept the statement of the court that "the property was bought by the respondent to be held in trust for the appellant, and the bill of sale was simply intended for respondent's security for the money advanced," the decision can be sustained as falling within that class of cases represented by *Borrow v. Borrow,* which hold that, where title is taken as security for money actually loaned, the case does not fall within the operation of the statute of frauds. If, however, we view this decision in the light of the actual facts found by the court, the result is incorrect and the case should be overruled. The facts, as set forth in the opinion, hardly show the taking of the title as security for an actual loan. If the evidence had been sufficient to justify the finding that "the bill of sale was simply intended for respondent's security for money advanced," the decision is authority for the creation of a resulting trust (in the opinion incorrectly called a constructive trust) where money is actually

loaned on a binding promise to repay by the trustee to the *cestui que trust.*

The statute of frauds was held not to apply in the case of *Webber v. Whidden,* 63 Wash. 472, 115 Pac. 1046, where the purchase was for the joint use of the parties and where the respondents had actually furnished their proportionate share of the purchase price and had agreed to furnish the balance when due, a resulting trust thereby being created.

A conveyance was held, in the case of *Kalinowski v. McNeny,* 68 Wash. 681, 123 Pac. 1074, to be an express trust, not to be established by parol evidence, where the conveyance was to the grantor's husband to retain title for a limited time and to be reconveyed on request. The court, without discussion, held that, there being an express agreement to hold the property and convey it, an express trust was created.

Parker v. Burwell, 69 Wash. 386, 125 Pac. 151, held that a constructive trust arose in favor of the plaintiff where he had purchased state land at public sale and fully performed the contract, but the defendant had procured from the state a deed upon a "misrepresentation as to his being entitled thereto." This case presents a typical case of a trust arising out of fraud and contrary to the intention of the parties.

A constructive trust is also held to have arisen in the case of *Soderberg v. McRae,* 70 Wash. 235, 126 Pac. 538, where title was acquired secretly by an employee, who attempted to use that title adversely to the rights of his employer.

Judge Gose, in the case of *Arnold v. Hall,* 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349, discusses the distinction between express and implied trusts, and after reviewing numerous authorities, held that an express trust which cannot be proved by parol arises where a son conveyed property to his mother by deed

absolute in form, without consideration, under an agreement that she should immediately reconvey to him, there being no claim of fraud other than the failure of the trustee to perform the express contract, since no fraud inhered in the original transaction and equity will not raise a constructive trust upon the mere breach of an express contract to convey:

"The respondent argues that the transaction raised either a trust *ex maleficio* or a constructive trust. He pleaded an express contract to reconvey the property, and the evidence submitted is in harmony with the complaint. This would create an express trust. It is true that equity will raise a constructive trust to prevent a fraud, but where there is an express trust there can be, in the very nature of things, no implied or constructive trust . . . It holds that equity will raise a constructive trust when an express contract to reconvey the property has been breached. Such view is not only a virtual repeal of the statute of frauds, but is in clearest conflict with the decisions of this court to which reference has been made."

Croup v. DeMoss, 78 Wash. 128, 138 Pac. 671, held that an oral agreement to purchase an interest in a mining claim for the use and benefit of another is unenforcible under the statute of frauds, and its breach does not give rise to a resulting trust where the trustee did not pay or advance any of the money to make the purchase.

"If there was any, it was an oral agreement and related to an interest to be acquired in real estate. Standing alone, it was, therefore, unenforcible under the statute of frauds. It is no answer to say that the failure to carry out such agreement was a fraud opening the whole transaction to parol proof. To so hold would be to abrogate the statute and make every contract rest in parol proof upon a mere allegation of its breach."

Where a conveyance is made to a son, who is acting as administrator for the purpose of disposing of the land to pay the debts of an estate under his agreement to reconvey all that remained after the payment of the debts, there was an express trust and not a constructive trust, and therefore it could not be established by parol evidence, is the holding of the court in *Nichols v. Capen,* 79 Wash. 120, 139 Pac. 868, the court saying:

"A trust *ex maleficio* is one where, by reason of some fraud on the part of the party obtaining the title to the land, the law implies a trust relation. In such cases, the trust arises out of, or results from operation of law, and is not within the contemplation of the parties at the time the conveyance is made. When, however, as in the case before us, a conveyance is made for an express purpose . . . the trust arises by act of the parties and not by operation of law—and cannot be established by parol."

The case of *O'Donnell v. McCool,* 89 Wash. 537, 154 Pac. 1090, was a case of resulting trust arising from the fact that a portion of the purchase price had been paid by one party and the title to the property had been taken by another. The court said:

"A resulting trust is a trust implied by law from the transactions of the parties. It never arises out of contract or agreement that is legally enforcible, 'but arises by implication of law from their acts and conduct apart from any contract, the law implying a trust where the acts of the party to be charged as trustee have been such as are in honesty and fair dealing consistent only with a purpose to hold the property in trust, notwithstanding such party may never have agreed to the trust and may have really intended to resist it.' 39 Cyc. 104. While such a trust may arise from other transactions, it has its most frequent application to transactions where one party pays the purchase price of property and title thereto is taken in another. In the case before us, if there is any resulting trust at all, it arises in this latter way."

In *Belcher v. Young*, 90 Wash. 303, 155 Pac. 1060, Judge Chadwick, speaking for the court, said:

"There is no separate instrument defining the trust, nor is there a definition of it in the deed. To show what the parties intended to do, resort must be had to parol testimony. This cannot be done. . . . By the same reasoning that supports the universal holding that an express trust cannot be proved by parol, it is held that an express trust that fails for want of proof will not be held to be a resulting trust in favor of the grantee except in certain cases. To so hold would defeat the rule. . . .

"No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself. Perry, Trusts (6th ed.), § 133.

"The holdings that the payment of the purchase money, or a new consideration, will create an implied or resulting trust in favor of the one paying the purchase price or giving the new consideration, which may be proved by parol, rests upon the same principle as the right to prove that a deed, absolute in form, may be shown by like proof to be a mortgage. It is an exception to, and at the same time an aid to, the general rule, that is to say, that equity will always intervene to protect the equitable title. An express trust failing for want of proof, the trust, if any, results in favor of the holder of the equitable title, and not in favor of the holder of the legal title. 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1032.

"All that we can make out of the case is that the parties have undertaken to create an express trust, and as against the holder of the equitable title, the trust has failed for want of competent evidence to sustain it."

Judge Fullerton, in *Ihrke v. Continental Life Ins. & Inv. Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F. 430, recognizing the class of cases which are taken out of the operation of the statute of frauds by the fact

that the *cestui que trust* had furnished the purchase price, said:

"We have held that, where money for the purchase price of land, or some part of the purchase price, is furnished by one person and the deed to the property is taken in the name of another, that other becomes the trustee of the first person to the extent of such first person's interest in the purchase price. *O'Donnell v. McCool,* 89 Wash. 537, 154 Pac. 1090, and cases there cited. The principle involved in these cases is not different from the principle involved in the case at bar. In the cases cited, the trust arises in favor of the person furnishing the purchase price, because in justice and equity the property is his, in other words, it was bought with his money."

In *In re Mason's Estate,* 95 Wash. 564, 164 Pac. 205, the same judge, speaking for the court, reviews several of the prior decisions of this court, and decided that an oral promise to convey land to another upon payment of the purchase price is not enforcible as an express trust because not in writing, nor as a resulting trust where there is no part payment by the *cestui que trust,* or other equitable circumstances, and the transaction was simply optional.

Womach v. Sandygren, 96 Wash. 12, 164 Pac. 600, holds that, where the purchase price of property was paid by an ancestor and the title thereof taken in the name of one of her children, a resulting trust was established.

Ackerson v. Elliott, 97 Wash. 31, 165 Pac. 899, considered the question of a constructive trust arising in favor of a principal whose agent had secretly acquired title to a portion of his principal's property.

In *Brown v. Kausche,* 98 Wash. 470, 167 Pac. 1075, after reviewing decisions of this court, Judge Main held that a devise by a husband of all of the community property to his wife, under an oral agreement that

she should use it during her life and hold it intact to be divided among the children, created an express trust upon the widow's deeding the property to a son in violation of the oral agreement; there was no resulting or constructive trust that could be established by oral evidence, Judge Main saying:

"In the present case . . . no fraud inhered in the original transaction. If the trust sought to be proved by parol in those cases was an express trust, it necessarily follows that, in the case now before us, the trust sought to be established by oral testimony was likewise an express trust. It is true that, in each of those cases, the trust sought to be established was in favor of the grantor, while here it was in favor of third persons—the children of the testator and his wife. But this fact could make no difference in the application of the principle. If, in the cases referred to, the trust arose by act of the parties and not by operation of law, it necessarily follows that, in the present case, the trust arose in the same way, that is, out of the oral arrangement between Mr. and Mrs. Kausche, and was therefore an express trust."

The last expression of this court upon the question here under consideration is contained in the case of *In re Parkes' Estate,* 101 Wash. 659, 172 Pac. 908, in which case it was alleged that there was an oral agreement that, if the appellant would convey all his interest in his father's estate to his mother, she would make a will devising and bequeathing all of the property of which she should die possessed to the appellant, and that the mother died and left a will which did not comply with this agreement.

"Appellant says this trust he seeks is an implied trust arising by operation of law. In another section of his brief he says 'the facts stated charged the decedent with a constructive or resulting trust and that her devisees would take under the will charged with the same trust.' Under the generally accepted mean-

ing of these terms, the facts disclose no implied trust, neither a constructive nor resulting trust. It cannot be an implied trust, for such a trust arises only from the language of the parties where no express trust is declared, but words are used from which the courts infer or imply a trust was intended. Perry, Trusts, § 25. The facts show nothing of this character. It cannot be a constructive trust or, as it is sometimes called, a trust *ex maleficio,* as such a trust only arises where one clothed with some fiduciary or like character, by fraud or otherwise, gains some advantage to himself which the law will not permit him to retain, but decrees that he hold it in trust for the one whom he has defrauded. Perry, Trusts, § 26. Nothing of this kind is pleaded. It is not a resulting trust, for such a trust can never arise from any contract or agreement of parties, but is one which the law presumes from their acts. Perry, Trusts, §§ 27, 134.

"It is plain that, if any trust is here created, it arises, not out of the law in the absence of agreement, but directly out of the agreement of the parties pleaded by appellant in his complaint. Appellant is directly seeking the enforcement of the agreement he alleges; an express agreement and an express trust. The facts pleaded can fit no other form of trust. Where two parties enter into an express agreement in relation to their property, there is no semblance of an implied or resulting trust; if trust of any nature it is an express trust and subject to all the limitations of such a trust, among which is that it cannot be established by parol where it seeks to affect the title to real property. Many of our cases have so declared the law and they will be found cited in *Arnold v. Hall,* 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349; *Nichols v. Capen,* 79 Wash. 120, 139 Pac. 868."

No more apt language could be chosen than that just quoted to cover the facts in the instant case.

The decisions of this court fall into these groups: (1) Those cases where intentionally the parties, by express agreement, have created express trusts, which cannot be proved by parol even though the agreements

have been breached; (2) those cases where parol evidence is admissible to prove express trusts by reason of such part performance by the *cestui que trust* as to remove the case from the operation of the statute of frauds; (3) those cases of resulting trust where the purchase price has been paid by one and the title taken by another, or where an actual loan has been made by the trustee who holds the title as security, this trust being treated as a mortgage; (4) those cases of constructive trust which have arisen from fraud inhering in the transaction and arising contrary to the intention of the one holding the legal title; (5) those cases where it has erroneously been held that a constructive trust has arisen by the breach of an express contract, where there was no fraud in the transaction and the only bad faith was in the breach of the contract. Here there was an express agreement to do a certain and definite thing; no fraud existed in the making of the agreement, and the only fraud which is claimed was in its breach. Under the decisions which we have analyzed, this is not sufficient to raise a constructive trust. No payment having been made on the purchase price by the respondent, this case does not fall within the class of cases which this court has held were resulting trusts, for here title has not been taken by one party and payment made by another party, nor was a loan made by the appellants which the respondent was obligated to repay. Nor has there been any part performance by the respondent which would take the case out of the operation of the statute.

Some claim is made by respondent that, because of his interest in the bankrupt company, he has been deprived thereof by the appellant's action, and that amounts in some way to such part performance as to make the statute inoperative. The record shows, however, that the respondent's interest in the company,

were it solvent, was not great, and furthermore, that the company was so completely bankrupt that the creditors would receive but a small portion of their claim and that there was no possibility whatsoever of the stockholders receiving any dividends upon their stock. Therefore the respondent's interest was not such as to avail him anything. The trust, upon the terms of which the respondent relies for his recovery of a decree in this action, being an express trust, the court was in error in receiving parol evidence to establish it.

The lower court is therefore reversed and the action dismissed.

MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14664. Department One. June 21, 1918.]

O. N. FINNE *et al.*, *Respondents*, v. MARYLAND CASUALTY COMPANY, *Appellant*, TOM HOGART, *as Tom Hogart & Company, Defendant.*[1]

PRINCIPAL AND SURETY—RELEASE OF SURETY—CONTRACTOR'S BOND—CONDITIONS. The surety upon a subcontractor's bond, entitled to notice and opportunity to complete the work, is not released from liabilities as they existed at the time of the default by reason of the principal contractor's assuming control and completing the work after giving notice of the default, where no burden or liability was imposed upon the surety on account of such completion of the work.

SAME—RELEASE OF SURETY—CONTRACTOR'S BOND — OVERPAYMENTS. Under a subcontractor's bond providing for retention of a percentage of the value of all work performed until complete performance, the surety is not released by payments during the progress of the work in excess of the amount due, where they were necessary to protect the property from lien claims and did not prejudice the surety, and more than the amount of the reserved fund had been used to pay creditors and diminish the liability of the surety.

[1]Reported in 173 Pac. 501.

SAME—CONTRACTOR'S BOND—LIABILITY OF SURETY—LIENS TO BE DISCHARGED. A surety upon a subcontractor's bond for the faithful performance of a state contract and full protection to the state against mechanics' liens and other claims, under Rem. Code, § 4326, is liable for claims duly filed with the state board for materials furnished prior to default the fairness of which was not questioned, although they had not yet been paid.

Appeal from a judgment of the superior court for King county, French, J., entered October 5, 1917, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Grinstead & Laube, for appellant.

O. L. Willett, Frank Oleson, and *John A. Soule,* for respondents.

MITCHELL, J.—The evidence in this case shows that respondents, plaintiffs, are partners, and on June 1, 1916, were already under contract with the board of regents of the University of Washington to construct a building, known as the Home Economics Building, and complete it by September 12, 1916, with a penalty of $100 for each day's delay thereafter that would interfere with the use of the class rooms and entrances. On June 1, 1916, respondents, by written contract, sublet the lathing and plastering of the building to defendant, Tom Hogart, who was to furnish material and labor, his work to start upon notice from respondents and continue in harmony with the other work on the building, and complete it without delay. Respondents agreed to pay defendant $5,774, as follows: On the 10th of the month, eighty-five per cent of the value of material and labor actually put in the building during the preceding month, according to approved estimates. On June 17, 1916, appellant, Maryland Casualty Company, delivered to respondents a bond assuring performance of the Hogart contract without loss or dam-

age to respondents. The bond, *inter alia,* contains these words:

"Provided, however, that this bond is executed upon the following express conditions, the performance of each of which shall be a condition precedent to any right of recovery thereon:

"First: That in the event of any default on the part of the principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety by registered mail, at its office in the city of Baltimore, Maryland, promptly and in any event within ten days after the obligee or his representative, or the architect, if any, shall learn of such default; the surety shall have the right within thirty days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract."

Tom Hogart signed the bond as principal. Hogart proceeded with the lathing and plastering (subletting the lathing to one L. E. Nelson) until Saturday, August 19, 1916, when Hogart's bank account was garnisheed, by reason of which the pay checks given his craftsmen on that day were dishonored. Plasterers could not be had for this work until the checks were paid. Hogart failed to take up the checks, and on August 23, 1916, respondents had a conference with the soliciting agent of appellant for Seattle, at that time explaining the situation; and on that same day, by registered mail, sent written notice to appellant at its home office in Baltimore, stating therein financial delinquencies of Hogart with respect to this contract; that his bank account had been garnisheed; that he was unable to pay or take care of his pay-roll of the last week. The notice further says as follows:

"Mr. Hogart's men have refused to continue on the job until they are paid for their last week's work, and in order to have the job completed it has become necessary for us to take up the checks issued by Mr. Hogart

last week, and it appears that we will have to take care of the pay roll from now on. We are charging these items to the account of Tom Hogart and are looking to your company as surety of his bond to see that we are reimbursed."

At this time, August 23, 1916, the work remaining undone under the Hogart contract included the two entrances to the building. Hogart did not return to work after August 19, 1916, and the work was at a standstill until August 24, 1916, when respondents took up the dishonored checks of Hogart and proceeded faithfully with the job, completing it about October 6, 1917, at prices for labor and material as low as possible. Seattle lawyers for appellant, on August 22, 1916, had notice of the situation, and on that day notified the home office by wire that Hogart had probably defaulted, and on August 28, 1916, according to reply instructions, the lawyers requested respondents to furnish a statement of the Hogart account and condition of the contract, which was done on August 29, 1916. Appellant never signified any wish to complete the work, and in no way objected to respondents completing it. Finne and Gjarde, respondents, then brought this action, declaring on the lathing and plastering contract of June 1, 1916, as to defendant Hogart, and on the bond as to both Hogart and the Maryland Casualty Company, demanding judgment in the sum of $3,573.25 and interest, alleging that amount to be the cost to appellant in excess of the contract price of $5,774, and some extras amounting to $161.25. Defendant Hogart, in his answer, counterclaimed for extra labor and material in the sum of $3,873.78; while the answer of appellant, Maryland Casualty Company, in addition to substantial denials, alleged affirmative matter (now most strongly relied on) that respondents, without appellant's consent, failed to perform

certain express and enumerated conditions contained in the bond, which it is claimed are conditions precedent to a recovery on the bond. Replies were filed denying the new matter in each answer. There was a trial without a jury, findings and conclusions were made, and judgment was entered for respondents in the sum of $3,016.58 against Hogart, and in the sum of $2,093.68 against the Maryland Casualty Company, the latter amount being also included in the judgment against Hogart; and it is further provided in the judgment that defendants may pay, and take credit on the judgment, the claims of L. E. Nelson for $481.72, and Sam Hunter & Company for $1,060.95. The Maryland Casualty Company appeals.

The facts above stated are supported by a preponderance of the evidence and so found by the trial court, as well as the following additional facts: Tom Hogart's counterclaim was established to the extent of $318.07 and no more; there were extras in the amount of $161.25; there was a balance of $481.72 due L. E. Nelson for lathing under his subcontract with Hogart, for which claim had been filed with the board of regents; there was a claim of $1,060.95 due Sam Hunter & Company for material furnished before default of Hogart, for which notice of delivery was given and claims filed with the board of regents; and the total cost to respondents was $9,472.50, which included $1,125.50, consisting of expenditures after Hogart's default or because of failure to file claims for work or material furnished Hogart, and hence no liability against respondents. The judgment of $2,093.68 against the company is arrived at by taking from the whole cost of $9,472.50 the sum of $1,125.50, made up of claims for which respondents are not liable and cost of construction to them after Hogart's default, which leaves $8,347, from which last amount take the Hogart

counterclaim, allowed, of $318.07, thus leaving $8,028.93, from which subtract $5,774 (the original Hogart contract price), plus extras of $161.25, equalling $5,935.25, thus finally leaving $2,093.68. So that the judgment complained of provides only enough to pay what had already been paid on Hogart's account before default or was unpaid at that time and supported by proper lien notices filed, and does not cover the cost of any work or material after Hogart's default, nor of either work or material furnished Hogart or Nelson where there was no lien or claim notice filed, and hence no liability therefor against respondents and their bondsman to the board of regents. It is also to be noticed that respondents had, prior to Hogart's default, paid him $5,400, a large portion of which, without question, was expended on the building.

Appellant alleges a large number of errors, but for the sake of clearness and order reduces them to five, as follows:

(1) "The failure of respondents to permit appellant to complete the job after Hogart's default is a breach of a condition precedent; it goes to the essence of the contract and defeats respondents' cause of action."

Appellant calls attention to the provision of the bond, above referred to, with reference to the performance of each express condition thereof as a condition precedent to any right of recovery and reciting that, in case of default, written statement of facts showing default and date thereof shall be delivered to the surety by registered mail, etc., and "the surety shall have the right within thirty days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract." As already seen, the notice and statement were promptly given by registered mail to the company at its home

office, and again within ten days furnished to the company's attorneys, who were, by specific directions of the company, acting for the purpose of getting such statement. But appellant also contends that, without any waiver on the part of the company, the respondents assumed control and completed the work after Hogart's default, thereby violating a condition precedent and defeating recovery. All discussion of this latter point is manifestly out of the way, because, as already seen, the judgment reflects no burden or liability on account of respondents' completing the job. This provision of the bond only reserved to the surety the option to complete the work, exercise of which, or the lack of it, could in no sense, under the issues of this case, modify or change the rights and obligations of the parties as they existed at the time of the default. No prejudice is shown.

(2) "The failure of the respondents to retain the 15 per cent reserve balance released the appellant."

The bond says:

"and shall also retain that portion if any, which such contract specifies the obligees shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract . . . until the complete performance by the principal of all the terms."

Now, remembering appellant's obligation is to assure the performance of Hogart's contract with respondents, notice must be kept of the terms of that contract, among which is the following: A payment of eighty-five per cent to be made to the party of the first part (Hogart) of the value of labor and materials actually incorporated into said work, on approved estimates on the 10th day of each month during the preceding month. The contract does not provide for payment to the contractor, as the work progressed, of

eighty-five per cent of the money *earned,* measured by the contract price, but of the "*value of labor and materials actually incorporated into said work on approved estimates.*" Hogart was working as subcontractor under a lump-sum contract, and if it be true that his contract price was too low, the payment of eighty-five per cent of value actually put into the job would lead to just such difficulty as we find here, for it appears from the evidence that the contractor spent on the job $600 more than he received, and still, at the time of his default, there were unpaid large sums against this work.

In the case of *Northwestern Nat. Bank v. Guardian Casualty & Guaranty Co.,* 93 Wash. 635, 161 Pac. 473, we held, in line with earlier decisions of this court therein referred to, that this contractor's reserve constitutes a trust fund for creditors, and that the surety has the right of subrogation to that balance should he be compelled to pay creditors, and also that he has the right to prevent its dissipation; and, continuing, we said in that case, quoting from *Maryland Casualty Co. v. Washington Nat. Bank,* 92 Wash. 497, 159 Pac. 689:

"His expectation when he goes on the bond is plain; *the principal may squander eighty per cent,* leaving the surety at the mercy of the creditors, but there is at least twenty *that will be applied to the creditors* in spite of him. *This amount,* originally reserved to protect merely the creditors, is a collateral security of the principal available to the paying surety."

It is plain that fifteen per cent of this contract price has not been squandered; but more than that amount, indeed, more than the contract price with extras added, has been used to pay creditors, every dollar of which diminished the bonding company's liability by just that much. Appellant insists on the rule "of strict right of law," but in the case of *Manhattan Co. v. United*

States Fidelity & Guaranty Co., 77 Wash. 405, 137 Pac. 1003 (in which a number of earlier cases of this court are reviewed), the rule is announced that a compensated surety on a building contract is not released unless something is done to his prejudice, and that payments during the progress of the work in excess of the amount due, where they are necessary to protect the property from lien claims of laborers, the amount of which is not questioned, will not release the surety. In all good reason, the respondents here occupy just as strong position as the owner of the building would, because, it being a public building, they are required to furnish bond themselves to take care of all claims for labor and material going into the building. Respondents are in no sense interlopers, but in that conduct of theirs now complained of were only protecting themselves, and it is significant that appellant neither pleads nor attempts to show any loss whatever on account of that conduct. All that respondents have paid, or are obligated to pay, for what had been done at the time of Hogart's default, appellant has indemnified them against.

(3) "The surety was released by increasing the contract price more than 10 per cent without its consent."

As to this, appellant, is in error. Extras were added only to the extent of $161.25, which is quite another matter from that of the work costing largely in excess of $5,774, which the surety company agreed should be the cost to respondents.

(4) "Respondents cannot recover for claims not already paid by them."

This refers to the claim of L. E. Nelson on the lathing subcontract filed with the board of regents for $481.72, and the claim of Hunter & Company for ma-

terial furnished Hogart and Nelson before default, for which notice of delivery was given and claim filed with the board of regents for $1,060.95, both of which claims are mentioned in the judgment, which provides that the appellant may pay them and take credit on the judgment. The fairness of each of these claims was established at the trial without objection, and even now their correctness is unchallenged. The surety company was obligated to indemnify and protect respondents, who were under contract to construct a public building for the board of regents of the university, and they must be held aware that, in such cases, respondents were under a bond, according to Rem. Code, § 4326, for the "faithful performance of their work and the full protection of the state against mechanics' and other liens: . . ."

(5) "The surety should be credited with the amount of Hogart's counterclaim."

This refers to the counterclaim of $3,873.78, alleged in Hogart's answer, and involves a question of fact, upon which a lot of testimony was submitted. An examination of it convinces us that it is not established by a preponderance of the evidence, other than the $318.07 allowed by the trial court, to which extent the judgment is less than it otherwise would be.

Judgment affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14787. Department One. June 21, 1918.]

SAMSON INVESTMENT COMPANY, *Appellant*, v. THOMPSON FURNITURE COMPANY, *Respondent*.[1]

LANDLORD AND TENANT—LEASE—CANCELLATION — EVIDENCE — SUFFICIENCY. In an action for rent, the evidence sustains findings that the lease was not cancelled but remained in force until the end of the term, where it appeared that a reduction in rent was agreed upon for the first three months of the last year, and upon further oral negotiations, rent at the reduced rate was paid and accepted monthly in full for the rent of each month.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 14, 1917, upon findings in favor of the defendant, in an action for rent, tried to the court. Affirmed.

Frank E. Green, for appellant.

Roberts, Wilson & Skeel, for respondent.

PARKER, J.—This action was commenced to recover possession of leased premises and rent therefor for the month of August, 1917. The defendant having voluntarily vacated the premises at the expiration of the August rental period and before trial of the case, there remains nothing for determination save the question of the defendant's liability for the rent sought to be recovered, the real question being as to whether or not the rent has been paid. Trial in the superior court without a jury resulted in findings and judgment in favor of the defendant, denying to the plaintiff the relief prayed for, from which it has appealed to this court.

In August, 1914, the parties duly signed and acknowledged a lease contract by which appellant leased to respondent the premises in question for the term of

[1]Reported in 173 Pac. 627.

three years commencing September 1, 1914, at a rental of $350 per month for the first year, $400 per month for the second year, and $450 per month for the third year, which rental respondent agreed to pay. The lease contained, among other provisions, the following:

"It is expressly agreed between said parties that the party of the second part is to expend the sum of four hundred fifty ($450) dollars in putting the said premises in shape for occupancy, which said sum of four hundred fifty ($450) dollars the party of the first part agrees to apply on the last month's rent of said lease."

This, it will be noticed, has reference to the rent for August, 1917, which is here in question. At the commencement of the term, respondent expended more than $450 in compliance with this provision of the lease, which it is concededly entitled to have credited to it against the $450 rent accruing for the month of August, 1917, if the lease remained in force during its entire term, which expired with that month. In the fall of 1915, respondent became convinced that its business was such that it could no longer rent at the rate specified in the lease. It so informed appellant and that it desired to have the lease abrogated and be relieved from its obligation to continue the tenancy. On September 21, 1915, in a letter written by its attorney, it stated to respondent:

". . . without waiving any provisions of the lease as to the future, if you will pay the sum of $350 for the month of September not later than tomorrow, September 22d, and thereafter the sum of $350 not later than on or before the 10th of October, and the sum of $350 not later than on or before the 10th of November, reduction to that extent will be made from the amount you have agreed to pay by virtue of the lease."

This, it will be noticed, was at the beginning of the second year during which the stipulated rent was to

be $400 per month. Rent was paid and accepted for these three months at the rate of $350. Near the expiration of this three months' period, respondent again asked that the lease be cancelled, which appellant refused to do, advising respondent that it might continue to pay $350 per month until further notice. There never was any writing signed by or on behalf of either of the parties touching the question of the cancellation of the lease, other than the letter of appellant's attorney above quoted from. During the remainder of the stipulated term, respondent continued to pay the rent for each month before the expiration thereof at the rate of $350, each of which payments was accepted by appellant as full payment therefor, except for the month of August, 1917, being the last month of the term, the rent for which respondent claims was paid at the beginning of the term under the provision of the lease above quoted. During the entire stipulated term, each party retained its duplicate copy of the lease and the tenancy was continuous. The evidence is in serious conflict touching conversations between the officers and agents of each party with the officers and agents of the other, relating to the claimed cancellation of the lease. Respondent's officers and agents asserted that they urged the cancellation of the lease to the end that it would be entirely relieved of its obligation to continue the tenancy and the payment of rent thereunder, which appellant always refused to do, except to accept $350 per month in full payment of the stipulated rent. Appellant's officers and agents asserted that, during the second year, they did consent to the cancellation of the lease and treat respondent as a mere month to month tenant, so that it was free to vacate the premises at the end of any month.

In its last analysis, there is nothing here to decide other than the question of fact as to whether or not

the minds of the parties met in an agreement to consider the lease cancelled as claimed by appellant. We have read the evidence with care and are quite convinced that the trial court rightly concluded that the lease remained in full force and effect during the entire stipulated term. It follows that the rent for August, 1917, was paid at the beginning of the term, as provided in the above quoted provision of the lease.

The judgment is affirmed.

MAIN, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

[No. 14817. Department One. June 21, 1918.]

DRESCHER LUMBER COMPANY, *Respondent*, v. FOREST MILLS OF BRITISH COLUMBIA, *Appellant*.[1]

TRIAL—ADMISSION OF EXHIBIT—OBJECTION—SUFFICIENCY—WAIVER. An exhibit, being a statement of account containing an admission against defendant's interest, stated by plaintiff's counsel to have been received through the mail in response to a statement sent by them, cannot be objected to for the first time on appeal for want of identifying testimony, where the only objection below was on the ground that it was in the nature of a compromise and not containing any admission.

Appeal from a judgment of the superior court for King county, Card, J., entered October 1, 1917, upon findings in favor of the plaintiff, in an action on an account stated, tried to the court. Affirmed.

Bronson, Robinson & Jones, for appellant.

Baxter & Jones, for respondent.

TOLMAN, J.—This action was brought by the respondent upon an account stated, to recover the sum of $332.25, as a first cause of action; and the sum of

[1]Reported in 173 Pac. 630.

$12, being a custom entry fee of $1.20 per car on ten car-loads of lumber, paid for and on behalf of the appellant, as a second cause of action.

The evidence shows that the first cause of action is founded upon a purchase by the respondent from the appellant, on July 15, 1914, of a car-load of lumber f. o. b. appellant's mill, and the paying therefor at or before the time of shipment of the same of $1,012.83; that the lumber was shipped east on respondent's order, and when it reached the ultimate purchaser, it was rejected as not being up to grade. The appellant was duly notified of the rejection, and that the lumber would be sold for its account for the best price obtainable if no other directions were given by a date certain. The appellant not in any way replying to this notice, the respondent proceeded to have the lumber sold in lots as it could best market it, for the account of the appellant, and after deducting from the amounts received the added items of freight, discount, storage, inspection fees and commission, which, together with the sum originally advanced as payment, amounted to a total of $1,481.04, the respondent found that the appellant was indebted to it in the sum of $315.13. The balance of the amount claimed in the first cause of action was made up of a freight adjustment on another car.

The respondent introduced but one witness, and upon his testimony, and the various written instruments evidencing the various facts, made its case. The appellant challenged the sufficiency of the evidence at the close of the respondent's case and moved that the action be dismissed. This motion was denied. The appellant elected to stand upon its motion and introduced no evidence. Whereupon judgment was entered against the appellant and in favor of the respondent as prayed for in the complaint.

Respondent's exhibit E, introduced upon the trial of this case, sets up the various items of debit and credit involved in the handling of the car of lumber for the account of the appellant, showing freight as per expense bill, $295.45, and the other items charged to the appellant, making a total charge of $1,481.04, including the freight. Credit is given for the proceeds of the sale of the lumber in question in the amount of $1,165.91, and the statement, exhibit E, shows a balance due the respondent upon that particular transaction of $315.13.

Respondent's exhibit H purports to be a counter statement made by the appellant to the respondent after the receipt by the appellant of exhibit E. And in this statement, exhibit H, appellant credits the respondent with $315.13, the balance shown to be due the respondent by exhibit E, but charges the respondent with the freight item of $295.45, which has already been referred to as charged to the appellant in respondent's exhibit E.

As we see it, the only real question in this case is, Was the statement, respondent's exhibit H, properly admitted in evidence? If so, it is binding upon the appellant as to the items which appear to be in dispute in the first cause of action, because, admitting and adopting the balance of $315.13, which could only have been taken from respondent's exhibit E, the appellant thereby admits that the respondent rightfully handled the shipment of lumber for its account; and having so admitted, there is no theory which could justify the appellant in charging the respondent with the freight item of $295.45, which was used as a debit against the appellant in the respondent's exhibit E, in which the balance of $315.13 due the respondent is arrived at.

We are unable to find any testimony in the record identifying exhibit H, or stating that it was ever re-

ceived by the respondent from the appellant. But counsel for respondent, without any such identification, produced the document and said:

"(Respondent's counsel.) If the court please, this was received by our firm. I will offer that in evidence as a statement received by us from the Forest Mills. (Appellant's counsel.) For what purpose do you offer it? (Respondent's counsel.) Just to show that they accept our theory of settlement, namely, that we were handling the car for their benefit. (Appellant's counsel.) If the court please, I object to this paper for this reason: It appears that the parties here were in dispute about some claims. This is a statement showing that the Drescher Lumber Company owes us $32, or something like that, whatever it is there, and it is to be, I think, considered in no other way than a sort of compromise over the whole proposition and not an admission of the particular items thereon. It may be material for other purposes, but I object to it as containing any admission as to the correctness of any items. (Respondent's counsel.) I want to offer it for whatever it is worth. (The court.) Does it refer to the demand here? (Respondent's counsel.) Yes. (The court.) It may be marked. (Whereupon statement was received in evidence and marked plaintiff's exhibit H)."

Then follows an argument by respondent's counsel as to the effect of the document, and the court says: "You claim that that was received by you from them?" To which respondent's counsel replied: "Oh, yes. That was received by us. That was mailed to us in response to a statement that we sent them."

It will be observed that counsel for the appellant nowhere objected to the introduction of the statement, exhibit H, upon the ground that there was no proof that it was made by the appellant or mailed by it to the respondent. He seems to have accepted the statement of opposing counsel as testimony in the case, and is, we think, bound thereby. Had the trial court's at-

tention been called to the lack of identifying testimony by a proper objection, the respondent, no doubt, would have supplied the omission, or the court would have sustained the objection. Not having objected upon the only sustainable ground, the appellant is now bound by his failure in that respect.

There seems to be no substantial dispute as to the other items in the first cause of action, or as to the $12 item set up in the second cause of action. There was some evidence to sustain these items, and none whatever to the contrary. The judgment of the trial court will therefore not be disturbed.

Judgment affirmed.

MAIN, C. J., PARKER, FULLERTON, and MITCHELL, JJ., concur.

[No. 14430. *En Banc.* June 22, 1918.]

CLARA BALL, *as Administratrix etc., Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—BRIDGES—CLEARANCE. In an action for the death of a brakeman, struck by a railroad bridge while leaning out to inspect a hot box, a railroad company is not negligent in maintaining the bridge with a clearance of only two feet, where that was the standard construction and employees were not required to be upon the side of the cars or engines when passing over the bridge.

SAME—INJURIES TO SERVANT—DEFECTIVE LOCOMOTIVES. In an action for the death of a brakeman, struck by a railroad bridge while leaning out to inspect a hot box, evidence that the engine was leaking steam to such an extent as to obscure the deceased's view of the bridge, and that it began to leak steam shortly after leaving the roundhouse and the condition became worse as the trip progressed, is sufficient to take the case to the jury upon the question of negligence in the operation of an engine in a defective condition, and whether that was the proximate cause of the death.

[1]Reported in 172 Pac. 1029.

SAME—INJURIES TO SERVANT—DUTY TO WARN. In such a case, the failure of the engineer to warn the deceased when the train was approaching the bridge, was not negligence, where there was no negligence in failing to sooner discover his position, and as soon as it was discovered the engineer called to him and attempted to stop the train.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 5, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

C. H. Winders, for appellant.

Griffin & Griffin, for respondent.

MACKINTOSH, J.—The plaintiff sued under the provisions of the Federal employers' liability act to recover damages resulting from the death of her husband while employed as head brakeman upon one of defendant's freight trains. The complaint alleged that the defendant was negligent, due to (1) insufficient clearance in the bridge at which the deceased lost his life; (2) defects in the locomotive pulling the train; (3) negligence on the part of the engineer who was driving the engine at the time. For answer, the defendant denied any negligence, and alleged that the deceased assumed the risk. Upon these issues the case was tried to the court and a jury, and resulted in a judgment in favor of the plaintiff for $8,000, half of which was apportioned to the widow, and half to a minor child. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court for a directed verdict. These motions were denied. After verdict, the defendant moved for a judgment notwithstanding the verdict and for a new trial. These motions were denied and judgment was entered. The defendant has appealed from that judgment.

The undisputed facts may be briefly stated as follows: James E. Ball, the husband of the respondent, was an experienced brakeman in the employ of the appellant. On the evening of November 20, 1916, at about eight o'clock, the train crew, consisting of a conductor, three brakemen, the engineer and the fireman, left Auburn Junction with a train of fifty-five cars, to be taken over the Cascade Mountains to Ellensburg. Mr. Ball was the head brakeman, and his position on the train when in motion was on the engine. The engine, a Mallet, was a large one, in fact, two engines under one boiler. It had sixteen driving wheels, eight under the front part and eight under the after part. This class of engines is in common use on the Northern Pacific Railway, and on other railroads drawing heavy trains over the mountains. On account of the length of the engine, the steam pipes connecting the boilers with the two engines were fitted with joints which permitted the engine to move around curves, of which there were many on that division of the railroad. The flanges of these sixteen wheels on the engine were oiled by means of a jet of steam which forced the oil against the flanges, so that there was always some steam escaping from these engines. On account of the movable joints, it was not uncommon for these engines, after going some distance, to leak more or less steam from the steam pipes. When this engine was placed upon the train it had been inspected. There is apparently no claim of negligence against the railway company for not properly inspecting the engine.

After the train left Auburn and had gone about thirty miles on its eastward journey upon the west side of the mountains, it was leaking steam to such an extent that, upon two or three occasions when the train was running slowly, the engineer could not see the semaphores at the side of the tracks. When the

train had passed through the Cascade tunnel at the summit of the mountains, a hot box was discovered on the right-hand side of the second car back from the engine. This hot box, at that time, was cooled down by Mr. Ball and an assistant brakeman, and the train proceeded to the next station down the mountain, when one of the brakemen again examined the hot box and concluded that it was proper to take the car on to its destination. After the train had proceeded on its way to somewhere in the vicinity of the Cle Elum river, and when the train was running from twenty to twenty-five miles an hour down grade, the engineer noticed that the hot box upon the freight car was "throwing fire." At that time Mr. Ball, the head brakeman, and another brakeman and the fireman were riding upon the engine. The engineer called the attention of the brakemen to the condition of the hot box; they each examined it from a position between the tender and the engine and gave the engineer a signal that the hot box was all right. After a little while the engineer again called the attention of the brakemen to the hot box, and a little later the engineer asked the fireman to examine the condition of the hot box. The fireman did not do so, but Mr. Ball, who evidently overheard the engineer, went out between the engine and the tender, got down upon the step of the engine, placed his hands behind him, holding to the grab-irons, and leaned out, face forward, to look at the hot box. The engineer, upon looking down and seeing him in that position, and seeing that the train had approached nearly to the bridge —the engine was then within about forty feet of the bridge—called to the brakeman, who, leaning out too far, was almost instantly struck by the iron beam at the end of the bridge, and was killed.

There is no dispute upon any of the facts above stated. Other facts may be referred to in a discussion

of the questions here presented. As stated above, the plaintiff, in the court below, and here, relies upon three facts to show negligence: First, that the bridge upon which Mr. Ball was killed was not constructed wide enough to make a sufficient clearance for a person upon the side of the engine; second, that it was negligence for the railway company to permit an engine to be used which was leaking a great deal of steam, and that the cause of the death of Mr. Ball was that he could not see the bridge, which the train was approaching, because of the escape of steam from the engine upon the side he was riding on; and third, that the engineer was negligent in not warning Mr. Ball of the bridge which the train was approaching. We are satisfied that neither the first nor third of these allegations are negligence, either in law or fact, and, for that reason, the trial court should have withdrawn them from the consideration of the jury.

I. The evidence offered on behalf of the defendant shows that this bridge was one of a number of like bridges upon this division of the Northern Pacific Railway; that it was a bridge of standard construction, fourteen feet six inches wide in the clear between sides; and that there was a clearance of twenty-four and one-half inches between the side of the engine and the side of the bridge. The evidence of the plaintiff also shows that the side of the bridge upon which the deceased was killed was approximately two feet from the side of the engine. Evidence was offered on the part of the plaintiff to the effect that, in cities and in railroad yards, bridges were constructed somewhat wider than the bridge here in question; but there is no evidence in the record to show that bridges upon the main lines outside of cities and towns were necessary to be constructed of greater width than this bridge, although there is evidence that on some of the roads bridges six

inches wider are constructed. But however that fact may be, it is plain, we think, under the authorities, that a railroad company has the right to use its own method in the construction of its track and bridges, which, if reasonably safe and the danger is open and apparent, would not constitute negligence. *Sainis v. Northern Pac. R. Co.*, 87 Wash. 18, 151 Pac. 93.

In the case of *Krebbs v. Oregon R. & Nav. Co.*, 40 Wash. 138, 82 Pac. 130, we said:

"What duty did the appellants owe the respondent in the construction and maintenance of bridges, situated as this one was? Numerous cases are cited where railway companies have been held liable to employees for injuries received from section houses, depots, coal sheds, signal posts, telegraph poles, etc., situated too close to the track. These structures differ materially from railroad bridges, which constitute a permanent part of the roadbed, and are of necessity part and parcel thereof."

and then, after referring to *Bryce v. Chicago, M. & St. P. R. Co.*, 103 Iowa 665, 72 N. W. 780, and after quoting from that decision, we said:

"We are of the opinion that the correct rule is announced by the supreme court of Iowa in the case above cited. If the employees of a railroad company are required to be on the sides of its cars in the discharge of their duty, as the trains pass over bridges, it is incumbent on the company to so construct and maintain its bridges as to make them reasonably safe for such use. But if the employees are not required to be on the side of the cars at such times, the company violates no duty it owes them by failing to construct its bridges of sufficient width to permit of an employee riding on the side of a car over a bridge."

In the case of *Cleveland, C., C. & St. L. R. Co. v. Haas*, 35 Ind. App. 626, 74 N. E. 1003, the appellate court of Indiana said:

"If defendant was guilty of negligence in maintaining the bridge, it was because of its insufficient width. The question therefore is, what should have been the width of such structure? Naturally its width should have reference to the use for which it was intended. In *Illick v. Flint, etc. R. Co.* (1888), 67 Mich. 632, 35 N. W. 708, it is shown that the standard width is fourteen feet, and the bridge in question was only thirteen feet and four inches wide, yet it was held that the company was not negligent in so maintaining it. In the opinion the negligence of the plaintiff's intestate is held by Sherwood and Champlain, JJ., to preclude a recovery, Morse, J., reserving his opinion; but all concur in holding that the negligence of the defendant was not shown by the evidence. In *Sheeler's Administrator v. Chesapeake, etc., R. Co.* (1885), 81 Va. 188, 59 Am. Rep. 654, the sides of the bridge were only thirteen and one-half inches from passing engines, but the court held that there was no negligence in this respect."

A large number of other cases are considered in that opinion where it was held that there was no negligence in the construction of bridges such as this, and where employees were not required to be on the sides of the trains when passing over them. We think there can be no doubt upon this question. The evidence shows that Mr. Ball had been over this division and over this particular bridge more than four hundred times in both daylight and darkness. It is not claimed, as we understand the record, that it was necessary for a brakeman to be upon the side of the car or upon the side of the engine when passing over this bridge. While the rules of the company required the brakeman to inspect hot boxes upon trains, no rule of the company is shown where brakemen are required to be upon the side of the engine of a moving train in order to make such inspection. These inspections, of course, were made when the train was stopped. This bridge, having a clearance of nearly two feet from the side

of the engine, was perfectly safe for the use which was to be made of it, and it was not anticipated, and could not be anticipated by the railway company, that any person would extend out from the side of the train so far that he could be injured by the sides of the bridge. We think it is plain that no negligence can be attributed to the railway company for the construction and maintenance of the bridge in the way it was.

II. It is next argued that the railway company was guilty of negligence because the engine pulling the train leaked steam to such an extent that the brakeman could not see the bridge which the train was approaching. While the evidence shows that engines of this character necessarily leak some steam at all times from the oiling apparatus or from the movable joints in the steam pipes, yet there is some evidence tending to establish the fact that the engine began to leak steam shortly after leaving the roundhouse, and that the condition became worse as the trip progressed, and by the time of the accident the engine was leaking a great amount of steam. These facts were sufficient to carry the case to the jury on the issue of the company's negligence in operating this particular engine at the time in violation of the employers' liability act, which prohibits the operation of an engine in a defective condition. The plaintiff was entitled to have the jury pass upon the question as to whether there was an escape of more than the ordinary amount of steam, and whether that was the proximate cause of the injury. If the defendant was negligent, the question whether the employee would be held to have assumed the risk was one for the jury.

III. It is next claimed that the engineer was negligent because he did not notify the deceased when the train was approaching the bridge. Assuming that the

engineer knew that the deceased was about to examine into the condition of the hot box and did not know of the near approach of the bridge, it cannot be assumed that the engineer knew that the deceased would hang himself so far out at the side of the train that he would be struck by the bridge. The evidence shows conclusively that, as soon as the engineer saw the position in which the deceased was before he met his death, the engineer called to the deceased and immediately attempted to stop the train; but he was too late. We think that there can be no possible excuse or reason for claiming that the engineer was negligent in not discovering the position of Mr. Ball before the accident happened. We are clear that no negligence in this respect was shown against the railway company.

The case will be remanded with directions to grant a new trial upon the issue presented by the second allegation of negligence.

MITCHELL, PARKER, TOLMAN, and HOLCOMB, JJ., concur.

[No. 14683. Department One. June 22, 1918.]

CHARLES AHLMAN, *Respondent*, v. W. J. WILSON *et al.*, *Appellants*.[1]

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—AMBIGUITY. Where a contract for the sale of land fixed a time limit for the grantor to remove certain timber, without describing the timber or fixing the amount, it is ambiguous, and parol evidence is admissible as to the amount of timber reserved in the sale and subject to removal.

TRIAL—ISSUES AND PROOF—INSTRUCTIONS. In an action for damages for the value of timber taken, and for damages to the land itself by the removal of the timber, in which much evidence on those issues was taken, they are properly submitted to the jury.

SAME. In such an action, it is not erroneous to submit an issue as to damages from "careless and negligent" logging operations, although the complaint did not use those words, when the complaint was clearly to that effect.

APPEAL—REVIEW—WAIVER OF ERROR. Error cannot be predicated upon the submission of an issue because of want of sufficient evidence thereon, where appellant failed to move to withdraw such issue and requested an instruction thereon.

APPEAL—REVIEW—VERDICT — EVIDENCE — SUFFICIENCY. A meager verdict for damages upon five causes of action, will not be held unsupported by the evidence, where there was evidence of specific wrongs entitling respondent to at least nominal damages, some of the issues were well sustained and warranted the verdict, and the case went to the jury unchallenged and without request for specific findings or pointing out any specific issue claimed to be unsustained.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 11, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Ballinger, Battle, Hulbert & Shorts, for appellants.

John F. Dore, for respondent.

FULLERTON, J.—In November, 1914, the appellants and the respondent entered into a written contract in

[1]Reported in 174 Pac. 970.

which the appellants agreed to sell, and the respondent agreed to buy, a certain tract of land situated in Kitsap county, described by legal subdivisions and recited to contain forty-five acres, more or less. The purchase price agreed upon was $2,400, of which sum $1,000 was paid on the execution of the contract, and the balance agreed to be paid on or before three years after the date of the contract. Among other conditions, the contract contained the following:

"All timber that is claimed by party of first part must be removed on or before one year from this date."

Prior to the execution of the contract, the appellants had made a preliminary survey of the land and had set corners approximately marking its boundaries. It was agreed, however, that the appellants would have the county surveyor officially survey the tract and permanently mark the corners. This survey was made some time after the date of the contract, when it was found that the preliminary corners set by the appellants were not in their proper places, the true corners varying in certain places at considerable distances therefrom.

The respondent entered into possession of the property on the execution of the contract and made improvements thereon, erecting a house and other buildings, doing some slashing of undergrowth which was afterwards burned and the burned tract seeded to clover. The tract had upon it, at the time of the contract of sale, a scattering growth of fir timber, suitable in part for the manufacture of lumber and in part for piling, and had upon it also some 100,000 feet of standing cedar timber. After the work of the respondent mentioned had been performed and within the year named in the contract, the appellants entered upon the land and proceeded to remove the timber. After they

had removed a considerable part of the fir and were proceeding to remove the cedar, the respondent interfered and by threats of violence prevented any further removal. The appellants owned timber lands lying to the south and west of the lands contracted to the respondent, and while logging the contracted tract, logged these other lands, dragging the logs by means of cables and donkey engines diagonally across the contracted tract.

In March, 1916, the respondent began the present action against the appellants to recover in damages. In his complaint he set up five separate causes of action. In the first he set forth the written contract of sale and averred that, subsequent to its execution, he agreed with the appellants that they might remove some twelve large fir trees that stood on the northeast corner of the contracted tract, in consideration of which the appellants agreed not to injure or damage the lands in any manner or commit waste thereon and to remove from the land all appliances, skids, landings and other obstructions used by them in removing the twelve trees; further averring that the appellants entered on the land in virtue of such permit and constructed a skid road thereon, grading the way for the road by making cuts of various depths in the soil and laying skids thereon, and also built a log landing thereon with heavy logs, and after completing their logging refused and neglected to remove the skids and landing or restore the roadway to its former condition, thereby damaging the respondent in the sum of $200.

In his second cause of action he averred that the appellants, while removing the trees mentioned in his first cause of action, wrongfully and unlawfully removed in addition thereto some twenty-five large fir trees, to his damage in the sum of $150.

In his third cause of action he averred that the appellants entered upon the lands without permit or authority and proceeded, by means of cables, donkey engines and other appliances, to drag logs across it from adjoining lands belonging to the appellants, thereby cutting deep ditches and trenches on the land, changing the course of a stream thereon, and rendering the land unsuitable for agricultural purposes, for which alone it was adapted, destroying the crop of grass and clover growing thereon and otherwise injuring the lands, to the plaintiff's damage in the sum of $1,200.

In his fourth cause of action, he averred that the appellants wrongfully and unlawfully, and without his permission, entered on the land and removed therefrom a large amount of piling timber of the value of $50, to his damage in that sum.

In his fifth cause of action he averred that, in connection with the contract of sale, the appellants agreed to cause a survey of the land to be made and mark the boundaries of the tract; that he afterwards pretended to make such survey and did set pretended corners, relying on which the respondent built his house and other buildings with reference thereto, and slashed undergrowth on the land up to the lines marked by corners; that he afterwards learned that the corners did not mark the true boundary, but marked the north and south lines 172 feet north of the true location thereof; and that, by reason thereof, the respondent slashed onto adjoining lands for which he received no benefit, and was forced to change the location of his house and other buildings, and was obliged to surrender fertile level land for rocky and unlevel lands, all to his damage in the sum of $525. The prayer of the complaint was for the recovery of these several sums, which aggregated $2,125.

The appellants, for answer, admitted the execution of the contract, that they removed certain timber from the land contracted to be sold to the respondent, and did haul across the land certain timber from adjoining lands, and denied the other allegations set forth in the several causes of action. For an affirmative defense they averred that, in making the contract of sale, all of the merchantable timber on the land was reserved, as well as the right to remove the same and the right to haul the timber from the adjoining lands across it; further averring that, in removing such timber and in hauling timber across such land, they pursued the usual and customary methods, doing no more damage to the land than was usual and customary and necessary under the circumstances; further alleging that they were forcibly prevented from removing the cedar timber, to their damage in the sum of $700, for which sum they demanded judgment.

The affirmative matter in the answer was put in issue by a reply, after which a trial was entered upon before a jury. No motion for a nonsuit or challenge to the sufficiency of the evidence was interposed by the appellants at any stage of the trial, and the cause was submitted to the jury upon all of the issues. The jury returned a verdict for the respondent in the sum of $150, on which judgment was subsequently entered. It is from this judgment that the present appeal is prosecuted.

The assignments of error question the correctness of certain of the instructions given by the court to the jury, the action of the court in refusing to give certain requested instructions, and the sufficiency of the evidence to sustain the verdict and judgment.

Of the instructions given, the first complained of was to the effect that the clause in the contract before quoted relating to the removal of timber from the con-

tracted land was ambiguous, and that the jury was at liberty to find from the writing and from the oral evidence of the parties what the actual contract between them was in that regard; that is, whether the appellants had the right to remove only twelve of the fir trees from the land, as contended by the respondent, or had the right to remove all of the merchantable timber therefrom, as contended by the appellants. It is contended by the appellants that the writing itself is an authorization to remove all of the timber on the premises, and precludes any oral inquiry pertaining to the particular question. But we think it manifest that the court's interpretation of the contract is its correct interpretation. It is clear that the primary purpose of the clause relied upon was to fix a time limit within which certain timber on the land claimed by the appellants could be removed. While it evidences the fact that certain timber was claimed by the appellants and permits its removal, it does not describe such timber nor fix its amount, and is as consistent with the contention that a limited amount of timber was reserved in the sale and subject to removal as it is with the contention that all of the timber was reserved and so subject. Being thus ambiguous it was subject to oral explanation, and the court did not err, since the evidence touching upon its meaning was conflicting, in submitting to the jury which of the different contentions was supported by a preponderance of the evidence.

The second instruction complained of was to the effect that, if the jury found from a fair preponderance of the evidence that the agreement between the parties was that the appellants were permitted to remove only twelve trees, the respondent was entitled to recover the value of the trees removed in excess of twelve; and that, if it found that the appellants were permitted to remove only twelve trees and that they removed more

than that number, the respondent was entitled to recover for the injury to his land caused by the removal of the excess number, if they found from a fair preponderance of the evidence that the logging operations necessary to remove the excess number caused damage to the lands. To this it is objected that the questions submitted were not within the issues and not within the evidence introduced under the issues. But the record clearly shows that the respondent not only based a cause of action upon the value of the timber taken, but based a cause of action upon the injury done to the land itself by the removal of the timber; that is to say, he averred damages because the appellants, in removing the timber, cut the land into ditches and trenches of varying depths, thus rendering it unsuitable for agricultural and grazing purposes, the only purposes for which it was useful. Much of the evidence on both sides was directed to these questions, and we can perceive no error because the court submitted them to the jury.

The third instruction to which objection is made reads as follows:

"If you find that the defendants left upon the land the logging platforms and if you find by a fair preponderance of the evidence that that was a damage to his land, then the plaintiff would be entitled to recover the damage which he sustained by their presence. In that account the only damage claimed by him is the amount necessary to be expended in their removal."

This instruction, standing alone, might be objectionable because not sufficiently definite. But the context makes the meaning clear. The court was speaking with reference to the respondent's version of the agreement between the parties; the contention that it was agreed between them that all such obstructions should be removed when the logging operations the respond-

ent agreed might be performed were completed. Further on the jury were told that, if they found with the appellants' contention concerning the terms of the contract, then the appellants had the right to construct all of the usual and necessary appliances customary to be constructed in successful logging operations, and would not be liable to the respondent for such construction. The instructions on the particular question, when read as a whole, are not erroneous, nor could the jury have been misled thereby.

The court further instructed the jury to the effect that, if they found with the appellants' version of the contract, the appellants would not be justified in carrying on their logging operations in a reckless, careless or negligent manner, so as to unnecessarily destroy the land for further use, and if they found that the appellants did carry on their logging operations in such manner, the respondent would be entitled to recover such sum as would fairly compensate him for the injury caused thereby. It is objected to this that the question submitted was not within the issues, but we think it was clearly therein. It is true the respondent did not, in his complaint, use the words "careless and negligent" in describing the manner in which the appellants used the land in their logging operations, but the allegations, while using other words, were plainly to that effect. It was also to this question that much of the evidence was directed. The instruction states a correct principle of law, and we think it applicable to the issues.

It is next complained that the court erred in instructing the jury with relation to the issue concerning the pointing out of the boundaries of the land. The instruction is not objected to because of its form or substance, but it is urged that the court thereby submitted a vital issue to the jury upon which the evidence

was insufficient to support a finding. But we cannot think the appellants are in a position to urge the objection, conceding it to be well founded in law. They not only failed to move during the course of the trial for a withdrawal of the issue from the jury, but they submitted a requested instruction on the very issue, the substance of which the court gave to the jury. This was a waiver of the objection, conceding it to be otherwise valid, and having once waived it, the appellants cannot now insist upon its review.

The requested instructions refused by the trial court require no special consideration. In the main they present the appellants' view of the disputed clause of the written contract, which we have concluded was correctly construed by the trial judge. In so far as they related to other questions, they were given in substance by the trial judge or were sufficiently covered by other instructions given.

The final contention is that the evidence was insufficient to sustain the verdict. The evidence, as we have said, went to the jury unchallenged, and the question of its sufficiency was suggested in the record for the first time by a motion for a new trial. The motion as filed was couched in the statutory language, was directed to the evidence generally, and pointed out no specific issue on which it was deemed insufficient. The verdict also was general, there being no request for specific findings. A perusal of the evidence discloses that, on certain of the issues, the jury could well have found the very meager verdict returned. On all of them, save perhaps on the one issue where we find the question waived, there was evidence of a specific wrong entitling the respondent to nominal damages, even though it be conceded that the proofs failed to show the amount of actual damages flowing from the wrong. It is not a case where there was an entire failure of

proof, but a case presenting several specific issues, certain of which were well proven and others only nominally. The presumption is that the jury performed their duty and founded their verdict upon the issues that were well proven. With the record in this condition, and having in mind the rule that, in an action where the recovery sought is damages solely, a failure to prove substantial damages is a failure of proof, we do not feel called upon to reverse the judgment.

It follows that the judgment must be affirmed, and it is so ordered.

MAIN, C. J., MITCHELL, PARKER, and TOLMAN, JJ., concur.

[No. 14831. Department One. June 22, 1918.]

VITTUCCI COMPANY, *Respondent*, v. CANADIAN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

CARRIERS—OF GOODS—CONTRACTS—ILLEGALITY—PLEADING—AFFIRMATIVE DEFENSE. In an action against a carrier for breach of its contract to expedite a shipment of merchandise, salable only at a limited season, the illegality of the contract as giving special privileges in violation of tariff rules and regulations cannot be raised where it was not specially pleaded as a defense.

SAME—SPECIAL CONTRACT—BREACH—PLEADING — COMPLAINT — OBJECTIONS. In an action against a carrier for breach of a contract to deliver goods at a certain destination within a specified time, in which the complaint set out, and the trial proceeded on the theory of, a special oral contract, objection cannot be made to some confusion in the language of the complaint, where no motion was made to strike or require an election.

SAME—SPECIAL CONTRACT—BREACH—TIME OF DELIVERY—DEFENSES —DILIGENCE. In such an action, it is no defense that the goods were transported with reasonable diligence.

SAME — SPECIAL CONTRACT — BILL OF LADING — CHANGING TERMS AFTER SHIPMENT—ACCEPTANCE—EFFECT. Where a carrier by special

[1]Reported in 174 Pac. 981.

oral contract to expedite a shipment of goods, agreed to deliver the same at a certain destination within a specified time, and pursuant thereto took entire charge of the shipment, it cannot afterwards, without consent of the shipper, issue a bill of lading containing different terms as the terms of the agreement; and the shipper, accepting the bill of lading after the goods have been shipped and it is too late for him to recede, will not be bound by the terms of the bill of lading.

EVIDENCE—DECLARATIONS OF PARTY—LETTERS. In an action against a carrier for breach of a special contract to deliver goods at a certain destination within a specified time, letters written by the plaintiff to defendant are not inadmissible as self-serving declarations where they contained no reference to the contract, merely expressing anxiety to get the goods in time, a payment of charges under protest, and a statement of damages for delayed delivery.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 19, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

Aust & Terhune, for respondent.

MITCHELL, J.—This is an appeal from a judgment upon a verdict in favor of respondent, plaintiff, for damages caused by failure of appellant to transport and deliver merchandise within a specified time according to an alleged oral agreement.

Respondent is engaged in business in Seattle, and appellant is a common carrier of passengers and freight for hire in Canada, as well as the state of Washington. In substance, the complaint alleges that, about October 15, 1915, the parties entered into an oral contract for the transportation by appellant of 315 barrels of chestnuts from Genoa, Italy, to Vancouver, B. C., thence to Seattle, the shipment to reach Seattle in time for the Christmas trade, December 3d to December 15th, appellant agreeing it would arrange for and take in its charge said shipment at all

times until it reached Seattle; that, about November 4, 1915, and in good time, the chestnuts were delivered and accepted for transportation at Genoa, Italy (all transportation charges being paid to appellant), but they did not reach Seattle until December 24, 1915, entirely too late for the Christmas market, to respondent's damage in the sum of $3,296.19. Appellant, in its answer, makes substantial denials, admits that, on November 4, 1915, 315 barrels of chestnuts were delivered to it at Genoa, Italy, and were transported by it, but alleges the transportation was in virtue of a bill of lading contract which is subsequently declared on as an affirmative defense in the answer, wherein it is stated the goods were delivered at Genoa, Italy, by one Carlo Cavargna, to whom was issued and who accepted a bill of lading for the shipment to Vancouver, B. C., there to be delivered to the order of the shipper, which bill of lading contains, according to the allegation of the answer, terms and conditions inconsistent with the terms and purposes of the alleged oral contract declared on in the complaint. This affirmative answer yielded to a demurrer interposed by respondent.

In support of the alleged oral agreement, the evidence, either undisputed or substantially, shows about as follows: Respondent, during the year 1915 and for some years prior thereto, was, and had been, engaged in business in Seattle as an importer and wholesaler. Mr. John Vittucci was president of the respondent corporation. Mr. W. P. Teegardin was resident contracting freight agent for appellant in Seattle for some time before and including the months of October, November and December, 1915. During the year 1915, and prior to October 7, respondent had arranged for the purchase of chestnuts in Italy, through a trader in Genoa, in a quantity larger than that involved in this

action. Mr. Teegardin, learning of the prospective shipping, sought, prior to October 7, 1915, a portion of it for his road, soliciting a number of times Mr. Vittucci and one of his employees named Sisley, who at all times insisted upon the importance of a seasonable delivery of the chestnuts for the Christmas trade, such delivery to be made in Seattle not later than December 15, 1915, in respect to which Mr. Teegardin, as an inducement, represented that his road could transport across the continent more expeditiously than other roads, being free from such inland congested freight centers as other roads passed through. Respondent arranged with its bank in Seattle for credit with the bank's correspondent in Genoa, Italy, to take care of the bill of lading issued at Genoa, which was accordingly done, and it, with the draft for the goods, was forwarded to the Seattle bank and taken up by respondent on December 9, 1915. About October 7, respondent received the expected cable from Italy concerning the chestnuts, and on that day he had his final agreement with Mr. Teegardin, as agent for appellant, to the effect that he would give him the transportation of the car of chestnuts if he would guarantee arrival at Seattle in plenty of time for the Christmas market, not later than December 12 to 15; that Mr. Teegardin agreed to do so, and stated again that his road was in a better position than any other road because it could ship from New York and avoid congestion at Chicago and the middle west; that Mr. Teegardin said: "We have plenty of time and I will guarantee you that we will get the chestnuts in time for the Christmas market;" and promised to wire the railroad company's representative in Genoa to take charge of the shipment there as soon as it was ready, and that they would look after it until its arrival here; that he was told he could not have the shipment but for his promise and

guarantee. Transportation rates were discussed and agreed on, the goods to be shipped to Vancouver first, thence to Seattle. On October 7, 1915, apparently before the final understanding, respondent cabled Carlo Cavargna, the broker in Genoa, as follows:

"Rush Vancouver 400 Naples, 600 barrels picottes. Have opened credit. Wire sailing steamer."

At the time this cable was sent, or just after, Mr. Vittucci told Mr. Teegardin that the broker in Genoa had not been given instructions how to ship, whether by the Canadian Pacific or not, and Mr. Teegardin said he would wire either through their headquarters at Montreal or direct to Genoa to their agent to take possession of the shipment. On October 8, 1915, Mr. Teegardin, from Seattle, sent this cable message:

"Carlo Cavargna,
"Genoa.
"If can make entire shipment 400 cases from Naples before 16th, otherwise ship 350 barrels from Genoa before 25th, routing via New York and Canadian Pacific. (signed) John Vittucci Company."

This last cable Mr. Teegardin says was prepared and sent by him, the expense thereof being absorbed by his company according to a business or trade-expense rule, with the knowledge of Mr. Vittucci, who testifies he never saw the dispatch until during the trial of this cause, though he knew Mr. Teegardin was to look after the shipment as he had promised. The shipment was received in Genoa by steamer on November 4th, reached Vancouver December 22d, and Seattle, December 24, 1915. About the time the chestnuts should have arrived in Seattle, respondent, by telephone and letters, almost daily urged Mr. Teegardin to get the shipment in. The goods were received too late and were nearly worthless in the market.

These facts show an express oral contract for an expedited shipment of merchandise salable only at a limited season, the violation of which, as in this case, carries damages, unless such transaction is under the ban of some law rendering it unenforceable and, in an action for the violation thereof, the pleadings properly present the issue of its illegality.

Appellant contends that the contract is illegal because of the provisions of an act of Congress entitled "An Act to Regulate Commerce," and amendments thereto, the rules and regulations of the interstate commerce commission, and the tariffs of appellant established in pursuance thereof, the broad purpose of which, as construed by the courts, would be defeated by sanctioning contracts giving special advantages such as expediting shipments to particular patrons. Armed with quite a line of authorities supporting such view, appellant charges error upon the trial court for refusing to let it prove that its applicable tariff did not permit contracts for expedited shipments, as a limitation upon the authority of its agent, Mr. Teegardin, by which respondent was bound. Under the pleadings, there being no such affirmative defense asserted, the trial court was right, under the rule announced in the well considered case of *Maitland v. Zanga,* 14 Wash. 92, 44 Pac. 117, to the effect that evidence to establish the illegality of a contract upon which the action is based cannot be introduced by a defendant who has not put the matter in issue by pleading it.

Again, it is claimed that the pleadings do not allege, nor the evidence show, a contract for transportation and delivery within a particular time, because in that portion of the complaint setting out the facts constituting the oral agreement the words "in the usual and customary time required for such transportation

and to reach Seattle in time for the Christmas market, same being from the 3d day of December to and including the 15th day of December," are found, and because at another place in the complaint, it is alleged that the respondent lost the Christmas market for the goods "by reason of the carelessness and negligence of the defendant," whereby the shipment was delayed in New York for three weeks.

The implied agreement of a common carrier is to transport safely and deliver at destination within a reasonable time, and in an action for such common law carrier liability, evidence that there had been no unreasonable delay would be an answer. It is otherwise when the action is for a breach of a contract to carry within a particular time for in such case the carrier becomes liable for the consequence of a failure to transport within that time according to the terms of its contract, and evidence of diligence would not excuse. Having in mind these different kinds of actions and the complaint in the present case, and admitting there may be some confusion in the language of the complaint in the particular referred to, it is noticeable that no motion was made by the appellant to strike or to require respondent to elect, and the whole trial proceeded on the theory that the action was for breach of the special oral contract, which, without question, was sufficiently set out in the complaint. The court so instructed the jury.

Treating the complaint as alleging an oral contract, appellant contends that the evidence does not support such allegations, and cites a number of cases on this general subject, wherein different courts held the facts they considered were not sufficient to establish an express contract or to justify recovery. A review of those cases is not attempted here because, in our opin-

ion, the evidence in this case is quite enough to show an express oral contract.

Having seen that the action was considered and tried as one on special oral contract, the trial court was right in not allowing appellant to introduce evidence tending to show the transportation of the goods was performed with reasonable diligence.

Another objection raised is that the court did not attempt to advise the jury in any way as to what they must find to justify a verdict based upon the contract, other than to instruct them, on the one hand, that, if they found from the evidence that appellant agreed with respondent to transport chestnuts from Genoa, Italy, to Seattle, Washington, and there deliver them not later than December 15, 1915, and that appellant failed to do so, then appellant would be responsible; and, on the other hand, if they found from the evidence that appellant did not so agree, the verdict should be for appellant. Such course on the part of the trial court is objected to on the score that appellant valued the evidence as disclosing no more than preliminary negotiations between the parties, and accordingly requested the following instruction:

"You are instructed that negotiations which may have taken place between the parties as to the time when the chestnuts ought to arrive in Seattle or as to the amount of freight which the defendant would charge would not be sufficient to constitute an agreement on the part of the defendant to deliver the chestnuts in Seattle in time for the Christmas market, 1915; and if you find from the evidence that such negotiations were all that took place between the parties your verdict must be for the defendant."

It is obvious that, since there was no affirmative defense of illegality of the contract, if the proposed instruction is a proper revelation of the law, it was the duty of the court, rather than so instruct the jury, to

dismiss the case, for, if at the trial there is not sufficient proof to support the allegations of the complaint, the court must so determine as a matter of law.

The proof shows that a bill of lading was issued at Genoa on November 4, 1915, by appellant for the transportation of chestnuts to Vancouver, B. C., and there deliver them to "order, notify John Vittucci and Co.," wherein it is provided:

"No carrier is bound to transport said goods by any particular train or vessel or in time for any particular market or otherwise than as required by law unless by specific agreement indorsed hereon."

On December 9, 1915, at its Seattle bank, respondent, upon presentation, paid the draft covering the invoice price of the chestnuts, and also lifted the bill of lading, which was thereafter surrendered to appellant with directions to deliver fifteen barrels of chestnuts to respondent's house in Vancouver and reship the balance to Seattle.

Appellant contends that all prior negotiations became superseded by the bill of lading issued at the time the goods were received and constitutes the contract fixing the rights of the parties. Without doubt, it is the law that a bill of lading, of itself, has a two-fold character. It is a receipt as to the quantity and description of the goods shipped, and also a contract to transport and deliver the goods to the consignee or other person therein designated upon the terms specified in it, and that, so far as it embodies the terms of the contract, it is not to be varied by parol evidence. This rule rests upon the assumption that the bill of lading was received and accepted as such by the one bound thereby and at the time of the shipment. However, this is not a controversy between appellant and Cavargna, the broker who actually delivered the goods at the time the bill of lading was issued at Genoa, but

one between appellant and respondent, who, in Seattle, made an oral contract for the expedited shipment of goods from Genoa, after satisfactory credit had been arranged by respondent, through the bank here and its correspondent there, to take care of the transportation charges in Genoa for and on behalf of respondent, such contract providing that appellant, for and on behalf of respondent, by direct wire or through its general headquarters at Montreal, would take complete charge of the whole matter of the shipment there, in obedience to which it did, at its own expense, wire direct to Genoa in respondent's name, and pursuant to which the goods were received and the bill of lading issued to Cavargna, the goods to be delivered here to "order and notify John Vittucci and Co." Appellant, making these arrangements at its own expense, was representing and using the name of respondent in obedience to the oral contract already entered into. To permit it afterwards to issue a bill of lading containing terms different from the contract already made for the service, without the consent or knowledge of respondent, and then insist that the bill of lading is the contract, is not permissible. The rule is that, where the bill of lading is handed the shipper after the goods have been shipped and it is too late for him to recede, he will not be bound by its terms. *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, 42 Wash. 64, 84 Pac. 620; *Revilla Fish Products Co. v. American-Hawaiian Steamship Co.*, 77 Wash. 49, 137 Pac. 337; *The Arctic Bird*, 109 Fed. 167.

While it is true the facts in the cases just cited appear to be somewhat different from those here, the rule announced is applicable because, considering the oral contract made in this case and the subsequent issuance of the bill of lading without consent of respondent, the respondent will be treated as the shipper and not bound by the terms of the bill of lading. In this connection,

appellant insists that, in any event, it was a question for the jury to determine whether or not the goods were transported under the oral agreement or under the bill of lading, but that the court by its instructions practically foreclosed this to the jury because of the court's view of the law in a case where a bill of lading is delivered subsequent to the shipment, on account of which it was then error on the part of the court to give any instruction as to the bill of lading. But we do not think so. Under a general denial, a different contract from the one asserted in the complaint is provable, and accordingly the trial court properly admitted the bill of lading and testimony concerning it; and, since appellant had denied, both by answer and evidence, the oral contract, the court very properly instructed with reference to the bill of lading as well as the oral contract, and its instructions were right.

Lastly, it is contended the court erred in permitting certain letters, dated December 8, 22, and 24, 1915, written by respondent to appellant, to go to the jury, because they tended to show respondent's version of the contract and as such were self-serving declarations. They are too lengthy to be set out here, but an examination of them shows they contain no reference to the terms of the contract, and first express anxiety to get the goods in time, and later on a payment of charges under protest because the goods were too late for the trade, and finally a statement of damages claimed because of delayed delivery.

On the whole, we are satisfied there was a fair trial, and the judgment is affirmed.

MAIN, C. J., PARKER, FULLERTON, and TOLMAN, JJ., concur.

[No. 14716. Department Two. June 24, 1918.]

In the Matter of the Estate of MARY COLLINS.[1]

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—DEBTS — ASSIGNMENT BY HEIRS. Since the fact of no debts can be established only by the appointment of an administrator and notice to creditors, it is error to refuse to appoint an administrator for an estate consisting only of a promissory note which had been assigned by all the heirs of the deceased, since Rem. Code, § 1364, provides that the property of the deceased shall be subject to the payment of debts; and it is not enough that an heir testified that he was positive that the deceased left no debts.

Appeal from an order of the superior court for Lewis county, Reynolds, J., entered November 6, 1917, refusing to appoint an administrator, after a hearing before the court. Reversed.

A. A. Hull and *Wm. M. Urquhart, Jr.*, for appellant.

J. E. Willis, for respondents.

MOUNT, J.—This appeal is from an order of the lower court refusing to appoint an administrator of the estate of Mary Collins, deceased.

On October 30, 1911, Mary Collins, a widow, conveyed to the appellant, T. O. Nelson, forty acres of land in Lewis county. The appellant and wife executed a mortgage upon this land to Mary Collins to secure the payment of $1,000, being one-half the purchase price thereof. The note for $1,000 was due and payable in five years from its date. On March 4, 1913, before the note became due, Mary Collins died intestate, leaving four children, namely, Lucy Dickson, James Collins, Daisy Harris, and George Collins. There were no other heirs, and each of these was more than twenty-one years of age. The only assets of the estate consisted of the debt owing by Nelson. After

[1]Reported in 173 Pac. 1016.

the death of Mrs. Collins, Lucy Dickson, Daisy Harris and George Collins assigned the note and mortgage to their brother, James Collins, who in turn assigned the note to Will Turner. There was no administration upon the estate. After the note became due, on September 11, 1917, T. O. Nelson, the maker of the note and mortgage, filed a petition in the superior court of Lewis county praying that he or some suitable person be appointed administrator of the estate. Thereafter the heirs of Mary Collins, and Will Turner, the assignee of the note and mortgage, filed objections to the appointment of an administrator, for the alleged reason that there was no property and no debts of the estate, and that there was no necessity for the appointment of an administrator. When the petition and these objections came on to be heard, the trial court dismissed the application, and this appeal followed.

We are of the opinion that the trial court erred in refusing to appoint a suitable person as administrator of the estate. It is no doubt true, as argued by the respondents, that the assignee of the note and mortgage would be authorized to receive payment and satisfy the mortgage in case there was a valid assignment thereof; but before there could be a valid assignment of the note and mortgage by the heirs of the deceased, after her death, it must appear that such heirs were authorized to make a valid assignment. Their right to make a valid assignment depended upon the fact that there were no debts against the estate; for the statute, at § 1364, provides that, when any person shall die possessed of property not disposed of by his will, such property shall be subject to the payment of the debts of the deceased. It is plain that, if there were any debts against the estate of the deceased, the heirs would not be authorized to transfer the estate so as to avoid these debts. It is true James Collins, a wit-

ness upon the trial, testified that he was manager of his mother's estate during her lifetime, and when asked "Did your mother leave any debts when she died?" over objection of the appellant's counsel, he answered, "I am positive my mother left no debts."

It is apparent that this was but the opinion of the witness. Furthermore, we are satisfied the fact could not be proved in that way; for this court, in *State ex rel. Mann v. Superior Court,* 52 Wash. 149, 100 Pac. 198, said:

"One of the purposes of administration is the payment of the debts of the deceased and the barring of claims against the estate. A mere statement or affidavit that there are no such claims cannot establish that fact. Such fact can only be judicially established by due course of administration. If the will of the testator had first been admitted to probate in this state and the widow applied for letters of administration upon the estate, we apprehend that the heirs or devisees could not defeat her right by asserting that there were no debts against the estate and no necessity for administration."

This court has held that a claim against an estate is not barred by lapse of time where no notice to creditors has been published as required by law. *Donnerberg v. Oppenheimer,* 15 Wash. 290, 46 Pac. 254; *McFarland v. Fairlamb,* 18 Wash. 601, 52 Pac. 239; *Gleason v. Hawkins,* 32 Wash. 464, 73 Pac. 533.

So it is plain that there may be debts, and if there are debts against the estate which were not barred before the death of the intestate, such debts are not now barred, because no administrator has been appointed and no notice to creditors has been published. Since the fact of no debts can be established only by the appointment of an administrator and notice to creditors, it follows that there was no proof that there are no debts, and the heirs of the deceased were not au-

thorized to make an assignment of the note and mortgage at the time they did. When the appellant pays the note he is entitled to have the mortgage satisfied by one authorized to do so, in order that he may not again be liable to pay the note or any part thereof. If he should now pay the note to Mr. Turner, who holds the assignment, that payment would not release appellant from accounting primarily to the estate for any debts which may hereafter be established against the estate, because the assignment is invalid as to creditors of the estate. We are satisfied, therefore, that there is necessity for the appointment of an administrator of this estate, in order that it may be finally judicially determined that there are no debts and that the appellant's mortgage, when paid, may be legally satisfied.

The order appealed from is therefore reversed, and remanded with directions to the lower court to appoint the appellant or some suitable person administrator of the estate.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

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1. ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS—POWERS OF EXAMINERS—STATUTES—ELIMINATING INVALID PORTION. Laws 1917, p. 421, giving the state board of law examiners power to examine applicants for admission to the bar, and to investigate the conduct of attorneys, initiate complaints and hear disbarment proceedings, subject to review by the courts, though unconstitutional in so far as it authorizes them to enter judgment of disbarment, is sustainable as to the delegated legislative and administrative functions, and authorizes the board to pass upon the evidence received, and report the same to the supreme court; since the valid is separable from the invalid portions of the act. *In re Bruen*..... 472

Authority:

Of state board of law examiners in disbarment proceedings, see ATTORNEY AND CLIENT.
Of brokers to receive payment for goods, see BROKERS.
Of insurance agent, evidence of, see INSURANCE, 3.

Automobiles:

Collision with in city street, see MUNICIPAL CORPORATIONS, 9, 10.

Bankruptcy:

1. BANKRUPTCY—PREFERENCE—SURRENDER OF LEASED PREMISES. Surrender of leased premises by a bankrupt is not a preference, where the property was in fact and in law the property of the lessor, subject to payment of rent, and had reverted through forfeiture. *Hills v. Stimson Co.* 1

Banks and Banking:

Right to enjoin unlawful interference with competition by fixing rate for savings deposits, see CONTRACTS, 1.

1. BANKS AND BANKING — INJUNCTION—CLEARING HOUSE ASSOCIATION —DISSOLUTION—POWER OF COURTS. Since the violation of a contract will not be restrained where it cannot be specifically enforced, the courts will not restrain the dissolution of a voluntary clearing house association the duties of which were those of an agent and fiduciary representative of its members, involving the exercise of skilled knowledge and judgment which cannot be specifically enforced by the courts. *Peoples Savings Bank v. First National Bank*..... 436

2. BANKS AND BANKING—CONTRACTS—AGREEMENT FOR LOAN—EVIDENCE —SUFFICIENCY. The evidence sustains findings that a bank did not agree to extend a credit of $50,000 to finance a contract, where all the negotiations were with the bank's vice president, who testified that he informed the contractor he could not make a loan in excess of $10,000 without approval of the discount committee, that he authorized a loan for $5,000, pending investigation and demand note was given therefor, and it appears that the discount committee declined to approve the credit and notice of such declination was immediately given. *Northwestern National Bank of Portland v. Pearson* 570

3. BANKS AND BANKING — PAYMENT OF FORGED CHECK — EVIDENCE — SUFFICIENCY. In a depositor's action to recover from a bank the amount paid out on a forged check, there is sufficient evidence of the forgery, where plaintiff testified that he did not sign the check, which disappeared when, during his absence, it came into the hands of his bookkeeper, who absconded, having also forged another check about the same time. *Denbigh v. First National Bank of Seattle* 546

4. SAME—PAYMENT OF FORGED CHECK—LIABILITY—DEFENSES—NEGLIGENCE OF DEPOSITOR. A bank has no right to charge against the depositor the amount paid out on a forged check, unless the depositor is estopped by his course of conduct, negligence or laches; and negligence is not shown by the employment of a bookkeeper who was recommended by a reputable firm, without notice of a previous criminal charge against him under an assumed name. *Denbigh v. First National Bank of Seattle*..... 546

Banks and Banking—Continued.

5. SAME—PAYMENT OF FORGED CHECK—NOTICE BY DEPOSITOR—LIMITATIONS. In view of Rem. Code, § 3363, limiting a bank's liability to depositors on forged checks, unless notice be given the bank within sixty days, a shorter limitation by contract will not be assumed from the fact of printed notice on the pass book requiring notice to be given within ten days, where the same was not specially called to the depositor's attention. *Denbigh v. First National Bank of Seattle* 546

6. SAME — PAYMENT OF FORGED CHECK—NOTICE BY DEPOSITOR—DILIGENCE. Diligence in giving notice of the payment of a forged check is shown where it appears that the depositor was absent when his bookkeeper, who committed the forgery, receipted for the vouchers, that he employed another bookkeeper within five days, and discovered the forgery within eight days, after his return and immediately gave notice thereof to the bank. *Denbigh v. First National Bank of Seattle* 546

Bar:

Of action by former adjudication, see JUDGMENT, 4-7.

Benefits:

Deduction of benefits from damages, see EMINENT DOMAIN, 20.
Recovery of by workman for partial disability, see MASTER AND SERVANT, 2.

Bequests:

See WILLS, 3, 4.

Bias:

Change of judges for, see JUDGES, 2,3.

Bible Study:

Credits for in public schools, see SCHOOLS AND SCHOOL DISTRICTS, 8.

Bill of Exceptions:

As part of record on appeal, see APPEAL AND ERROR, 15.

Bill of Lading:

See CARRIERS, 5.

Bill of Sale:

See SALES.

Bills and Notes:

Wife's separate debt, see HUSBAND AND WIFE, 3.

1. BILLS AND NOTES—ACTION ON DUE BILL—DEFENSES. In an action on a due bill given as the personal obligation of the manager of a company, the fact that the company had been given credit on its books for the amount is no defense to the action against the manager. *Nebraska Investment Co. v. Corlett* 151

Bills and Notes—Continued.

2. BILLS AND NOTES—ACTIONS—DEMAND. A demand is not a prerequisite to suit upon a demand note, made payable at the office of the plaintiff bank, the bringing of suit being a sufficient demand. *Northwestern National Bank of Portland v. Pearson*..... 570

Blasting:

Liability of state for injuries to property in construction of highway, see EMINENT DOMAIN, 13, 18, 21.

Bona Fide Purchaser:

Of municipal warrant, see MUNICIPAL CORPORATIONS, 14.
At tax sale, see TAXATION, 2.

Bonds:

On appeal, see APPEAL AND ERROR, 7, 8, 36-39.
Contractor's bonds, see COUNTIES; MUNICIPAL CORPORATIONS, 1, 13; RAILROADS, 1; STATES.
Liability of community property on husband's bond, see HUSBAND AND WIFE, 2.
For operation of jitneys, see MUNICIPAL CORPORATIONS, 4-6.
Sureties on bonds, see PRINCIPAL AND SURETY.

Breach:

Of contract to deliver goods, see CARRIERS, 2-5.
Of covenant, see COVENANTS, 2, 3.
Of warranty, see INSURANCE, 4-7.
Of lease through defects in premises, see LANDLORD AND TENANT, 3.

Bridges:

Negligent maintenance of by railroad company, see MASTER AND SERVANT, 4.

Brokers:

Contract for commission, see FRAUDS, STATUTE OF, 4.

1. BROKERS—AUTHORITY—PAYMENT — EVIDENCE — SUFFICIENCY. Payment to brokers for box shooks ordered through them, is authorized where previous orders had been paid for in that way, and upon demand for payment, the buyers wrote that it had been mutually agreed that they might not be able to pay promptly and that they anticipated paying in the manner previously pursued, and the seller replied that that would be satisfactory. *Grays Harbor Commercial Co. v. Taku Canning & Cold Storage Co*..... 594

Burden of Proof:

Presentment of claim to administrator, see EXECUTORS AND ADMINISTRATORS, 5.

Cancellation of Instruments:

Cancellation of lease, see LANDLORD AND TENANT, 1.
Rescission of contracts, see VENDOR AND PURCHASER, 1-3.

Carriers:

Of passengers in motor vehicles, see MUNICIPAL CORPORATIONS, 4-6.

1. CARRIERS—REGULATION — OVERCHARGES — ORDER OF PUBLIC SERVICE COMMISSION—REVIEW—STATUTES. Under Rem. Code, § 8626-86, providing for writs of review to review "any order" of the public service commission, certiorari lies to review the commission's order for the repayment by a carrier of an overcharge; and the shipper need not first assail the order in an action to recover the overcharge authorized by Id., § 8626-91. *State ex rel. Tacoma Eastern R. Co. v. Public Service Commission* 589

2. CARRIERS—OF GOODS—CONTRACTS—ILLEGALITY—PLEADING—AFFIRMATIVE DEFENSE. In an action against a carrier for breach of its contract to expedite a shipment of merchandise, salable only at a limited season, the illegality of the contract as giving special privileges in violation of tariff rules and regulations cannot be raised where it was not specially pleaded as a defense. *Vittucci Co. v. Canadian Pac. R. Co.* 686

3. SAME—SPECIAL CONTRACT—BREACH—PLEADING—COMPLAINT—OBJECTIONS. In an action against a carrier for breach of a contract to deliver goods at a certain destination within a specified time in which the complaint set out, and the trial proceeded on the theory of, a special oral contract, objection cannot be made to some confusion in the language of the complaint, where no motion was made to strike or require an election. *Vittucci Co. v. Canadian Pac. R. Co.* 686

4. SAME—SPECIAL CONTRACT—BREACH—TIME OF DELIVERY—DEFENSES—DILIGENCE. In such an action, it is no defense that the goods were transported with reasonable diligence. *Vittucci Co. v. Canadian Pac. R. Co.* 686

5. SAME—SPECIAL CONTRACT—BILL OF LADING—CHANGING TERMS AFTER SHIPMENT—ACCEPTANCE—EFFECT. Where a carrier by special oral contract to expedite a shipment of goods, agreed to deliver the same at a certain destination within a specified time, and pursuant thereto took entire charge of the shipment, it cannot afterwards, without consent of the shipper, issue a bill of lading containing different terms as the terms of the agreement; and the shipper, accepting the bill of lading after the goods have been shipped and it is too late for him to recede, will not be bound by the terms of the bill of lading. *Vittucci Co. v. Canadian Pac. R. Co.* 686

6. CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE—SNOW AND ICE ON PLATFORM—EVIDENCE—QUESTION FOR JURY. The negligence of a street

Carriers—Continued.

car company is a question for the jury, in an action by a passenger, injured in a fall on alighting from an icy platform, where there was evidence that snow and ice was allowed to accumulate on the platform, and there was some evidence that it had not been cleared off at the end of the run. *French v. Spokane & Inland Empire R. Co.* 236

Caveat Emptor:

Application of rule to tenant leasing premises, see LANDLORD AND TENANT, 2.

Certainty:

In declaration of trust, see TRUSTS, 1.

Certiorari:

Review of order of public service commission for repayment of overcharge by carrier, see CARRIERS, 1.

1. CERTIORARI—JURISDICTION—AMOUNT IN CONTROVERSY. The limitation of $200 upon the jurisdiction of the supreme court, is equally applicable to appeals and to writs of review. *State ex rel. Simpson v. Smith* 574

Change:

In bill of lading after shipment, see CARRIERS, 5.
Of street grade, see MUNICIPAL CORPORATIONS, 1, 2.

Change of Judges:

For bias, see JUDGES, 2, 3.

Charge:

To jury in civil actions, see TRIAL, 3, 4.

Chattel Liens:

Foreclosure of, see LIENS.

Checks:

Payment of forged checks, see BANKS AND BANKING, 3-6.

Chose in Action:

Right of assignee to maintain action as real party in interest, see ASSIGNMENTS.

Cities:

See MUNICIPAL CORPORATIONS.

Claims:

Against bond of contractor, see COUNTIES; PRINCIPAL AND SURETY, 1.
Against executor of estate, see EXECUTORS AND ADMINISTRATORS, 2.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 4-10.
Against estate of deceased surety, see PRINCIPAL AND SURETY, 6.

Clearing Houses:

Dissolution of clearing house association, see ASSOCIATIONS.

Enjoining dissolution of voluntary clearing house association, see BANKS AND BANKING, 1.

Collateral Undertaking:

See FRAUDS, STATUTE OF, 1.

Collision:

With automobile in city street, see MUNICIPAL CORPORATIONS, 9, 10.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Common Carriers:

See CARRIERS.

Community Property:

See HUSBAND AND WIFE, 1, 2.

Compensation:

For property taken or damaged for public use, see EMINENT DOMAIN, 11, 12.

For injured employee under workmen's compensation act, see MASTER AND SERVANT, 2.

Of receiver, see RECEIVERS.

Of officers, see TIME.

Of trustees, see TRUSTS, 6-9.

Competency:

Of experts as witnesses, see EVIDENCE, 4,5.

Competition:

Contracts creating unlawful competition, see CONTRACTS, 1.

Compromise and Settlement:

1. COMPROMISE AND SETTLEMENT—ITEMS INCLUDED. Where an item included in a suit had been dismissed as a subject of controversy therein, without prejudice to an independent action, and the suit went to final judgment on other items and appeals were taken, a compromise of the appeals and judgment did not include the item dismissed from the suit. *Nebraska Investment Co. v. Corlett*.. 151

Computation:

Of time in fixing salary of officers, see TIME.

Concealment:

Of fraud, see FRAUD.

Conclusiveness:

Of judgment, see JUDGMENT, 4-7.

Condemnation:

Taking or damaging property for public use, see EMINENT DOMAIN.

Condition:

Precedent to action on contractor's bond, see COUNTIES.
Precedent to action on bond, see PRINCIPAL AND SURETY, 3.
Precedent to action for rescission, see VENDOR AND PURCHASER, 1.
Precedent to taking of bequest, see WILLS, 3.

Conditional Sales:

See SALES.

Conditions:

Conditional delivery of deed, see ESCROWS.
Of reward, compliance with, see REWARDS.
In telephone franchise, see TELEGRAPHS AND TELEPHONES, 1, 2, 4, 5.

Conduct:

Of judge as harmless error, see APPEAL AND ERROR, 25.

Consideration:

For contract, see CONTRACTS, 2.
For contract by executor to pay legacy, see EXECUTORS AND ADMINISTRATORS, 2.
For decedent's contract to pay for services, see EXECUTORS AND ADMINISTRATORS, 10.
For wife's note binding separate property, see HUSBAND AND WIFE, 3.

Consistency:

Amendment of pleading on retrial, see PLEADING, 2.

Constitutional Law:

Validity of jitney bus act requiring security bond from operators, see MUNICIPAL CORPORATIONS, 6.
Giving credits for bible study as violation of inhibition relating to use of public funds for religious instruction, see SCHOOLS AND SCHOOL DISTRICTS, 8.

1. CONSTITUTIONAL LAW — COMBINING LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL POWERS—ATTORNEYS—DISBARMENT. The power to hear and determine the right of an attorney to practice law being inherent judicial power, Laws 1917, p. 421, giving to the state board of law examiners the power to hear and determine disbarment proceedings, creates a judicial tribunal, which at the same time is combined with the administrative and delegated legislative power to examine applicants for admission to the bar, investigate the conduct of attorneys, and initiate complaints for disbarment, in vio-

Constitutional Law—Continued.

lation of Const., articles 2, 3 and 4, providing for three separate and distinct branches of government. *In re Bruen*..... 472

2. CONSTITUTIONAL LAW—DUE PROCESS—ATTORNEYS—RIGHT TO PRACTICE—NOTICE—PROCEEDINGS. Laws 1917, p. 421, providing for the disbarment of attorneys, upon notice and complaints made to and heard by the state board of law examiners, reported to the supreme court, does not violate the constitutional inhibition against the taking of property without due process of law, or any other constitutional provisions, except in so far as it authorizes a final judgment by the state board. *In re Bruen* 472

Construction:

Of contracts, see CONTRACTS, 3.
Of option to buy mining stock, see CORPORATIONS, 1.
Of order in probate to sell real estate, see EXECUTORS AND ADMINISTRATORS, 11.
Of lease relating to installation and ownership of equipment in building, see FIXTURES.
Of statutes, see STATUTES.
Of will, see WILLS, 3, 4.

Contest:

Costs in contest over management of estate, see COSTS.
Of wills, see WILLS, 2.

Continuance:

Of hearing on affidavit of prejudice, see JUDGES, 2.

Contractors:

On public work, see COUNTIES; EMINENT DOMAIN; MUNICIPAL CORPORATIONS, 1, 2, 13; STATES.
Sureties on bond of, see PRINCIPAL and SURETY, 1, 5, 7-9.

Contracts:

See COVENANTS; DEEDS; INSURANCE; SALES.
Agreement for loan, see BANKS and BANKING, 2.
Carriage of goods, see CARRIERS, 2-5.
Damages for breach, see DAMAGES, 1.
Escrow agreements, see ESCROWS, 1.
Parol evidence to explain ambiguity in, see EVIDENCE, 3.
Of decedent, consideration for, see EXECUTORS AND ADMINISTRATORS, 10.
By executor to pay legacy, see EXECUTORS and ADMINISTRATORS, 2, 3.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Interest on, see INTEREST.
Leases, see LANDLORD AND TENANT.
For public improvements, see MUNICIPAL CORPORATIONS, 13.

Contracts—Continued.

Between adjoining owners of tide lands for waterway, see NAVIGABLE WATERS.

Suretyship, see PRINCIPAL AND SURETY.

For railroad construction work, see RAILROADS.

Stipulation in actions, see STIPULATIONS.

Telephone franchise controlling rates to be charged, see TELEGRAPHS AND TELEPHONES, 4, 5.

Sales of realty, see VENDOR AND PURCHASER.

1. CONTRACTS—VALIDITY—UNLAWFUL COMPETITION—WHO MAY QUESTION. A party cannot invoke the aid of the courts to restrain an unlawful interference with competition by the fixing of a three per cent rate for savings deposits in banks, where the effect thereof would be to give such party the advantage of its equally unlawful contract fixing a four per cent rate. *Peoples Savings Bank v. First National Bank* 436

2. CONTRACTS—CONSIDERATION—SEAL. The presumption of consideration for a contract under seal is rebuttable. *Gates v. Herr* 131

3. CONTRACTS—CONSTRUCTION—RAILROAD CONSTRUCTION—DELIVERY OF MATERIALS. A contractor's agreement to deliver to the subcontractor sand and gravel "as near as available railway trackage shall permit, to bunker, hopper or working sites" does not require delivery to the subcontractors to bunkers and working sites, where the principal contract, which was made part of the agreement, plainly indicated that the traffic should not be interfered with, and placed the entire contract of tracks and traffic in the hands of the railway superintendent, who refused permission to make deliveries west of a certain street; since the tracks were not then "available" for such deliveries. *Houghton v. Hoy* 358

4. CONTRACTS—BY TELEPHONE—EVIDENCE. A contract for an extension of time to complete a sale is not shown by a telephone conversation in which an offer to extend the time was made, and no response whatever was made by the other party. *Flood v. Von Marcard* 140

Contributory Negligence:

Of traveler injured on highway, see HIGHWAYS, 4.

Of person injured on street, see MUNICIPAL CORPORATIONS, 9, 10.

Of child injured through defective swing, see SCHOOLS AND SCHOOL DISTRICTS, 5.

Conversion:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

See DEEDS; MORTGAGES.

Order in probate to sell real estate, see EXECUTORS AND ADMINISTRATORS, 11.

In trust, see TRUSTS.

Contracts to convey, see VENDOR AND PURCHASER.

Corporations:

See MUNICIPAL CORPORATIONS.

Mandamus to public service corporation, see MANDAMUS, 3.

Conversion of property of stockholder by trustees, see TROVER AND CONVERSION.

1. CORPORATIONS—STOCK—OPTIONS—CONSTRUCTION. An option to buy 100,000 shares of mining stock, to be taken and paid for in such sums and amounts as may be required in the development of the company's mine, without any limit as to time, was terminated when the mine by a discovery and shipment of ore became profitable and needed nothing for its development. *Woldson v. Richmond Mining, Milling & Reducing Co.* 248

2. CORPORATIONS—RIGHTS OF STOCKHOLDER. Where a stockholder's operation of a corporation plant was by sufferance only, without any right of possession, upon dispossession he cannot recover for lost profits anticipated in continuing the business. *Clark v. Groger*. 188

3. CORPORATIONS—DISSOLUTION—POWERS OF TRUSTEES. A corporation with defined powers limited to the manufacture and sale of beer and the operation of a brewery, is not dissolved by the state-wide prohibition law; and its stockholders are not thereby made tenants in common of its property, but as between stockholders, it may engage in any lawful business, and the trustees have power to assemble its assets and liquidate its indebtedness and, pending a formal dissolution, conduct its affairs. *Clark v. Groger* 188

4. SAME—RIGHTS OF STOCKHOLDERS. A stockholder of such a corporation dispossessed by stockholders in control of the stock, has no right to assert possession over other stockholders, by reason of his former control of the majority of the stock. *Clark v. Groger* .. 188

Costs:

In will contest, see WILLS, 2.

1. COSTS—IN PROBATE—DISCRETION. Where a contest over the management of an estate was mainly a personal one between co-trustees, it is proper to deny costs to either party. *In re Cornett's Estate* 254

Counties:

Establishment of highway, see HIGHWAYS, 3.

1. COUNTIES—CONTRACTOR'S BONDS — NOTICE OF CLAIM—SUFFICIENCY. Mere notice of an assignment by the contractor of the reserve fund

Counties—Continued.

due him, is not a compliance with Rem. Code, § 1161, requiring, as a condition precedent to action on the contractor's bond, a notice of claim against the bond, stating that the party has a claim against the bond, designating the amount, the names of the principals and sureties and describing the work, where the assignment did not contain any of the required essentials and was not filed with the county auditor as required of the statutory notice. *Aberdeen State Bank v. Spokane Paving & Construction Co.* 68

Court Reporters:

Allowance of per diem compensation, see TIME.

Courts:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.
Recall of remittitur by supreme court, see APPEAL AND ERROR, 33.
Entry of judgment against sureties on supersedeas bond, see APPEAL AND ERROR, 38, 39.
Disbarment proceedings, see ATTORNEY AND CLIENT.
Power to enjoin dissolution of voluntary clearing house association, see BANKS AND BANKING.
Power to suspend sentence on plea of guilty, see CRIMINAL LAW, 1.
Jurisdiction to grant equitable relief in action for unlawful detainer, see FORCIBLE ENTRY AND DETAINER.
Mandamus to courts, see MANDAMUS, 1, 2.
Prohibition to courts, see PROHIBITION.

1. COURTS—JURISDICTION—LANDS IN ANOTHER STATE. The courts of this state have jurisdiction to enter judgment *in personam* in an action to cancel a note and mortgage upon lands in another state, upon the ground of fraud, having acquired jurisdiction of the person of the defendant. *Smith v. Fletcher* 218

2. COURTS—SUPREME COURTS—TERMS. Under Const., art. 4, § 2, providing that the supreme court shall always be open, there are no terms of court, and the close and termination of a session, provided for by Rem. Code, § 4, does not preclude the court from entertaining an application to recall a remittitur and vacate a judgment entered at such term. *Gordon v. Hillman* 411

3. COURTS—SUPREME COURT—ATTORNEYS—DISBARMENT. The supreme court having been vested with the exclusive power to admit and enroll attorneys, and having inherent power to disbar them, the legislature could by Laws 1917, p. 421, vest it with exclusive jurisdiction of disbarment proceedings, upon reports made to it by the state board of law examiners. *In re Bruen* 472

Covenants:

1. COVENANTS—RUNNING WITH LAND — EASEMENTS — ENFORCEMENT — EQUITY. A contract granting an easement in a strip of tide lands to be kept open as a waterway for the passage of water craft is a

Covenants—Continued.

covenant running with the land, or at least one that will be enforced in equity against parties with notice. *Pioneer Sand and Gravel Co. v. Seattle Construction & Dry Dock Co.* 608

2. COVENANTS — OF SEIZIN — ACTION FOR BREACH — LIMITATION OF ACTIONS. A covenant of seizin is broken at the moment it is made, if there could be no seizin by grantee, and the statute of limitations commences to run immediately. *Whatcom Timber Co. v. Wright* 566

3. SAME—WARRANTY—ACTION FOR BREACH—LIMITATIONS. Covenants of warranty and quiet possession of land the title to which was in the United States and in the possession of third persons, are broken when made without further acts of the parties, and the statute of limitations against an action for breach commences to run from the date of the deed. *Whatcom Timber Co. v. Wright* 566

Criminal Law:

See ASSAULT AND BATTERY; FORGERY.
Mandamus to courts in criminal prosecution, see MANDAMUS, 1, 2.
Accepting earnings of prostitute, see PROSTITUTION.

1. CRIMINAL LAW—SENTENCE—POWER TO SUSPEND—STATUTES. Under Rem. Code, § 2280, authorizing suspension of sentence upon the conviction of a minor, and Id., § 2190, making it the mandatory duty of the court to pronounce sentence after verdict of guilty or finding against the defendant, the superior court has no power to suspend sentence upon a plea of guilty by an adult. *State ex rel. Lundin v. Superior Court* 600

2. CRIMINAL LAW — APPEAL — FAILURE TO PROSECUTE — DILIGENCE. Where an appeal from a conviction in justice court was perfected in February, 1916, and not brought to trial for over a year, it is properly dismissed for want of diligence in prosecuting it. *State v. Greenwald* 593

3. SAME—APPEAL—RECORD. Proceedings not made a part of the record in a criminal appeal cannot be considered. *State v. Greenwald* 593

Cross-Examination:

Harmless error in failure to allow, see APPEAL AND ERROR, 24.

Damages:

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 11, 12.
To property from construction of state highway, see EMINENT DOMAIN, 13-21.
For interruption of quiet enjoyment by interference with light, see LANDLORD AND TENANT, 6, 7.
For waste in cutting timber during period of redemption, see MORTGAGES, 3.

Damages—Continued.

For mistake in sending telegram, see TELEGRAPHS AND TELEPHONES, 6.

1. DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES—COST OF PROCURING PERFORMANCE. Where, upon breach of a contract for the removal of rock, the owner made a new contract on the same terms with a third party, who refused to carry it out because he was losing money, the owner had an election to hold the third party for damages or to make a new contract with him agreeing to pay him a greater sum; and having elected the latter, his measure of damages for the breach of the original contract was the reasonable and necessary expense of procuring completion of the work by another, which was the sum paid the third party, where it appears from the evidence that it was not unreasonably high and was a reasonable price. *Smith Sand & Gravel Co. v. Corbin*..... 306

2. DAMAGES—FUTURE RESULTS—EVIDENCE—OPINION EVIDENCE. In an action for personal injuries to a child that would in the future result in impairment of mental and physical faculties, the evidence of experts as to injuries that would result with "reasonable probability," is not error. *Holt v. School District No. 71*..... 442

Dams:

Prescriptive right to maintain, see WATERS AND WATER COURSES, 1.

Death:

Of party to action ground for abatement, see ABATEMENT AND REVIVAL.

Of party pending appeal, substitution, see APPEAL AND ERROR, 6.

Of judge, power of successor in office, see JUDGES, 1.

Discretion of succeeding judge in granting new trial, see NEW TRIAL.

Substitution of parties, see PARTIES.

Wrongful death caused by operation of railroad, see RAILROADS, 2.

Debt:

Of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

Promise to pay debt of another, see FRAUDS, STATUTE OF, 1.

Community or separate character of, see HUSBAND AND WIFE, 2-4.

Payment of by legacy, see WILLS, 4.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Decision:

Review on appeal, see APPEAL AND ERROR, 1-3.

On appeal, see APPEAL AND ERROR, 32-35.

Of industrial insurance department, review, see MASTER AND SERVANT, 3.

Declarations:

As evidence in civil actions, see EVIDENCE, 2.

Deeds:

Covenants in deeds, see COVENANTS, 2, 3.
In escrow, see ESCROWS.
Water rights, see WATERS AND WATER COURSES, 2, 3.

1. DEEDS — GRANT OF EASEMENT — AFTER-ACQUIRED TITLE — STATUTES. A duly acknowledged contract between parties in possession of tide lands with preference right to purchase, granting easement for a waterway, is a deed, within Rem. Code, § 8765, providing that, where any person shall convey by deed any lands without having title, his after-acquired title shall inure to the benefit of the grantee, and thereafter run with the land; and the omission of the word "heirs" is immaterial, under Id., § 8753, dispensing with all such terms in conveyances. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co*..... 608

Defect:

Amendment to cure defects in bond on appeal, see APPEAL AND ERROR, 8.
In leased premises, see LANDLORD AND TENANT, 2-4.
Injury from defective sidewalk, see MUNICIPAL CORPORATIONS, 8.

Delivery:

Breach of contract to deliver goods, see CARRIERS, 2-5.
Of materials under railroad construction contract, see CONTRACTS, 3.

Demand:

For payment of bill or note, see BILLS AND NOTES, 2.
For exhibits, see PLEADING, 3.

Description:

Of property in petition for condemnation, see EMINENT DOMAIN, 22.
Of property in contract relating to lands, see FRAUDS, STATUTE OF, 3, 4.

Diligence:

In asking recall of remittitur, see APPEAL AND ERROR, 34.
In giving notice of payment of forged check, see BANKS AND BANKING, 6.
Of carrier in shipment of goods, see CARRIERS, 4.
Dismissal of appeal for want of diligence, see CRIMINAL LAW, 2.

Disbarment:

Of attorney, see ATTORNEY AND CLIENT.
Validity of laws empowering board of law examiners to hear and determine disbarment proceedings, see CONSTITUTIONAL LAW, 1.

Disbarment—Continued.

Laws relating to disbarment of attorneys as denial of due process of law, see CONSTITUTIONAL LAW, 2.

Of attorney, jurisdiction of supreme court, see COURTS, 3.

Discharge:

From liability as surety, see PRINCIPAL AND SURETY, 6-8; STATES, 1.

Discretion of Court:

Review of on granting new trial, see APPEAL AND ERROR, 18.

Allowance of costs in probate, see COSTS.

In granting new trial, see NEW TRIAL.

Allowance of amendments to answer, see PLEADING, 1.

Award of costs in will contest, see WILLS, 2.

Dismissal and Nonsuit:

Dismissal of appeal for failure to prosecute, see CRIMINAL LAW, 2.

Disqualification:

Of judge, see JUDGES 2, 3.

Dissolution:

Of clearing house association, see ASSOCIATIONS.

Enjoining dissolution of voluntary clearing house association, see BANKS AND BANKING, 1.

Of corporation, see CORPORATIONS, 3.

Divorce:

Review of order directing payment of attorney's fees and temporary alimony, see APPEAL AND ERROR, 3.

1. DIVORCE—SUIT MONEY — TEMPORARY ALIMONY — EVIDENCE — SUFFICIENCY. A wife is not entitled to suit money and temporary alimony out of community property of little consequence where it appears that it was all necessary to the maintenance of an established business, and it appears that she is possessed of a large amount of money and property and is living at home at the expense of the defendant. *Dilatush v. Dilatush* 504

Docks:

Condemnation of lands for, see EMINENT DOMAIN, 1.

Documents:

As evidence in civil actions, see INSURANCE, 3.

Duebills:

See BILLS AND NOTES, 1.

Due Process of Law:

See CONSTITUTIONAL LAW, 2.

Earnings:

Accepting earnings of prostitute, see PROSTITUTION.

Easements:

As covenant running with land, see COVENANTS, 1.
Grant of easement, see DEEDS.
Grant of for waterway, see NAVIGABLE WATERS.
Constructive notice of, see VENDOR AND PURCHASER, 5.
Water rights, see WATERS AND WATER COURSES, 2, 3.

1. EASEMENTS—APPURTENANCES. Easements in gross are not favored, the strong presumption being that they are appurtenant. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.*..... 608

Election of Remedies:

By injured workman, see MASTER AND SERVANT, 1.

Eminent Domain:

Proceedings to condemn land of minor for highway, see HIGHWAYS, 3.

1. EMINENT DOMAIN—PURPOSES—"DOCKS." Rem. Code, § 8740, empowering a railway company to condemn lands for "docks" and warehouses, authorizes the condemnation of sufficient ground for excavating a slip or waterway adjoining a proposed wharf; "dock" meaning an artificial basin for vessels or the space between two adjoining piers or wharves. *State ex rel. Patterson v. Superior Court* 331

2. EMINENT DOMAIN — STATE PROPERTY — WATER RIGHTS — STATUTES. The right to acquire state property is not granted by Laws 1917, p. 447, § 4, declaring that the beneficial use of water is a public one, and providing that any person may exercise the right of eminent domain to acquire any property or rights necessary for the storage of water for beneficial uses; since the power must be clearly granted and will not be implied, and the statute must be strictly construed; and especially since the act, being part of the general water code, was not intended to, and did not, repeal Rem. Code, § 6828, covering proceedings to condemn state property. *State ex rel. Mason County Power Co. v. Superior Court*..... 291

3. SAME — STATUTES — RETROACTIVE EFFECT. Where there was no right to condemn state property at the time the proceedings were instituted, subsequent legislation authorizing the condemnation of state property would not retroactively affect or sustain the suit. *State ex rel. Mason County Power Co. v. Superior Court*..... 291

4. SAME — PROPERTY DEVOTED TO PUBLIC USE—NAVIGABLE STREAM—PUBLIC NECESSITY. A timber company having large tracts adjacent to a stream navigable for logging purposes, and making prior use of the stream as a highway, cannot resist condemnation thereof by a water company for the purpose of supplying a city with water,

Eminent Domain—Continued.

but is entitled to recover its damages *pro tanto*, to the extent of its injury; since property devoted to a public use may be condemned for a different public use where there is a public necessity therefor. *State ex rel. South Fork Log Driving Co. v. Superior Court*.... 460

5. SAME—PROPERTY DEVOTED TO PUBLIC USE—ANTICIPATION OF FUTURE NEEDS—PUBLIC NECESSITY. A water company supplying a city with water cannot resist condemnation by another water company for the same purpose, of lands acquired and held by it as a riparian owner on the stream in anticipation of its future needs, where it is not shown that it has put or intends to put the lands to a public use within a reasonable time, or that the same will be necessary for the carrying out of its franchise obligations to the city, or that it has the right or means to divert the water; its right as riparian owner giving it no right to divert the stream (overruling on rehearing, Id., 94 Wash. 691). *State ex rel. South Fork Log Driving Co. v. Superior Court*..... 460

6. SAME—PROPERTY DEVOTED TO PUBLIC USE—DEFENSES. A company supplying water to a city cannot resist condemnation of its riparian rights on a stream by another water company on the ground that it had never been requested and had never refused to furnish a supply of water to the city for all purposes, where it was not using and did not have the right to use the waters if it had been requested to supply additional water. *State ex rel. South Fork Log Driving Co. v. Superior Court*..... 460

7. SAME—PROPERTY DEVOTED TO PUBLIC USE—NECESSITY. A water company having a franchise to supply a city with water may condemn the prior rights of a log-driving company in a stream, whether its rights be destroyed or merely impaired, where by an admeasurement of the public interests it appears that the same will contribute directly to the daily necessities of the public, while the prior use contributes only indirectly and as reflected through the maintenance of a purely commercial enterprise. *State ex rel. South Fork Log Driving Co. v. Superior Court*..... 460

8. EMINENT DOMAIN — NECESSITY — PRACTICABILITY. Upon certiorari to review a finding of public necessity, that the plan invites engineering difficulties will not defeat the proceedings when it cannot be said to be impracticable, as relators lose nothing if the scheme fails. *State ex rel. South Fork Log Driving Co. v. Superior Court*. 460

9. SAME—NECESSITY—FINDING—SUFFICIENCY. A finding of public necessity is sufficient without finding in terms that the public interest required it, where from the facts found it appeared that plaintiff had a franchise to furnish a city with water, that the city depended upon the company, whose supply was insufficient to meet growing demands, and that the company was condemning in aid of its franchise, in view of Rem. Code, § 925, requiring that the enterprise be public, required in the public interest, and the property

Eminent Domain—Continued.

sought necessary therefor. *State ex rel. South Fork Log Driving Co. v. Superior Court* 460

10. SAME—"NECESSITY"—EVIDENCE—SUFFICIENCY. A reasonable "necessity" within Rem. Code, § 925, is shown for the condemnation for a dock by a railroad company, where it appears that its business has grown to an extent requiring the facilities, and that still greater facilities will be required, although the company owns other property suitable, but less convenient, for the purpose which would not answer all the purposes sought. *State ex rel. Patterson v. Superior Court* 351

11. EMINENT DOMAIN—DAMAGES — INSTRUCTIONS. In condemnation proceedings for an alley which divided appellant's plant into two tracts, upon an issue as to the damage to the remainder, a requested instruction to the effect that the jury should not consider the fact that the city might grant a permit to connect the two tracts by overhead or underground crossings is not covered by a general instruction that the abutting property owner has no greater rights to the alley than any other inhabitant of the city; and it is error to refuse the request where evidence of the damage was based upon the assumption that the owner had no right to make the connection. *In re Seattle*..... 286

12. SAME. Such requested instruction is not covered by an instruction that the jury might consider damages caused by compliance with any ordinance of the city governing the erection of such plants as the owners, where it referred to fire ordinances in evidence and not to any ordinance permitting connections over or under the alley. *In re Seattle*..... 286

13. EMINENT DOMAIN—DAMAGING PROPERTY—LIABILITY OF STATE. Under Const., art. 1, § 16, forbidding the taking of private property without just compensation, the state is liable if, in building a state highway without negligence without having condemned the right, it was necessary to blast out and dump rock and material upon a railroad track to its damage. *Great Northern R. Co. v. State*.... 348

14. SAME—LIABILITY OF STATE—NATURE. In the taking or damaging of private property for public use without negligence, the state acts in its sovereign capacity, and failure to condemn the right is no excuse for denying the state's liability for the damage done, as it is not a trespasser or tort feasor. *Great Northern R. Co. v. State* 348

15. SAME — LIABILITY OF STATE—ACTS OF CONTRACTORS OR OFFICERS. Where such damage was done by direction of the state, it is liable as the superior, although it does the work by contract or by direction of its duly authorized officers. *Great Northern R. Co. v. State* 348

16. SAME—LIABILITY OF STATE—INJURIES NOT ANTICIPATED. The state would be liable for such damages necessarily resulting from the

Eminent Domain—Continued.

construction of a highway, although they were not anticipated or contemplated in the plan of construction. *Great Northern R. Co. v. State* 348

17. SAME—LIABILITY OF STATE—INSTRUCTIONS. In such case, where it is admitted that all the work was carefully done, it is error to give an instruction leaving to the jury whether any damage resulted from negligent acts. *Great Northern R. Co. v. State*..... 348

18. SAME—LIABILITY OF STATE—BLASTING. If blasting is necessary in the construction of a highway by the state, in its sovereign capacity, the act is not tortious and the state is liable for the injuries inflicted. *Great Northern R. Co. v. State*..... 348

19. SAME—LIABILITY OF STATE—DAMAGES. Where the state in building a highway injures a railroad by blasting and dumping rock upon the track, it is liable for the increased expense incurred in operating trains and time consumed in making repairs and labor and supplies on account of delays, as a deprivation of the use of its property, as though it had been physically taken. *Great Northern R. Co. v. State* 348

20. SAME—LIABILITY OF STATE—DAMAGES—OFFSET OF BENEFITS. If a railroad company, damaged by the building of a state highway, was benefited in a special degree, the state may offset any benefits that may be ascertained with reasonable definiteness, under Const., art. 1, § 16, providing that no right of way shall be appropriated to the use of any corporation "other than municipal" until full compensation is paid, irrespective of any benefit from the improvement. *Great Northern R. Co. v. State*..... 348

21. SAME—LIABILITY OF STATE—DAMAGES—EVIDENCE. In an action for damages to a railroad track through the blasting for a state highway, it is error to allow the contractor to testify that the company refused to allow him to take up the rails before setting off blasts, and that the same would have avoided the damage, there having been no condemnation, as temporary removal interfered with the owner's use. *Great Northern R. Co. v. State*..... 348

22. EMINENT DOMAIN—PETITION—DESCRIPTION OF LANDS—SUFFICIENCY. In condemnation proceedings which include portions of a vacated street that had reverted to abutting owners, a petition is insufficient where it contains only a general description of all the abutter's interests in the vacated street, in view of Rem. Code, § 921, providing that the property sought to be condemned must be described with reasonable certainty. *State ex rel. Patterson v. Superior Court* 331

23. EMINENT DOMAIN — WRONGFUL TAKING—INJUNCTION. Injunction does not lie to restrain a public service corporation from using lands acquired by it for and already put to public use; but the complaining party will be left to his remedy at law. *Irwin v. J. K. Lumber Co.* 99

Employees:

See MASTER AND SERVANT.

Enforcement:

Of covenant, see COVENANTS, 1.

Equity:

See INJUNCTION; TRUSTS.
Enforcement of covenants, see COVENANTS, 1.
Right to amend complaint to ask equitable relief, see FORCIBLE ENTRY AND DETAINER.
Relief in equity to protect insurable interest of vendor under conditional sales contract, see INSURANCE, 1.
Application of statute of limitations, see LIMITATION OF ACTIONS.
Accounting for rents and profits during period of redemption, see MORTGAGES, 2-4.
Right of subcontractor to relief on failure to file lien, see MUNICIPAL CORPORATIONS, 2.

Escrows:

1. ESCROWS—AGREEMENT—SUFFICIENCY—RETAINING CONTROL OF DEED. A valid escrow agreement is not shown by the fact that parties contemplating an exchange of properties executed deeds and left them with the agent as a matter of convenience pending an inspection and final decision as to whether an offer made would be accepted, where the depositor's deed was not delivered until the agent was advised of such acceptance; since the depositor did not part with control of the deed. *Nelson v. Davis*..... 313

2. SAME—PART PERFORMANCE — TAKING POSSESSION. Part performance, taking the case out of the operation of the statute of frauds, is not shown by the fact that the parties were given the key for the purpose of inspection, and remained only a reasonable time for that purpose. *Nelson v. Davis*..... 313

Establishment:

Of highways, see HIGHWAYS, 1-3.
Of trusts, see TRUSTS, 2-4.

Estates:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

By judgment, see JUDGMENT, 4-7.

1. ESTOPPEL—BY RECORD—JUDGMENT AND FAILURE TO APPEAL. Judgment unappealed from in a contempt proceeding to enforce an injunction, in which the court had jurisdiction to assess plaintiff's damages, dismissing the proceeding without prejudice to plaintiff's

Estoppel—Continued.

right to maintain an action for damages, estops the defendant from asserting that plaintiff elected his remedy in bringing an action for an injunction and so could not sue for damages. *Matzger v. Arcade Building & Realty Co.* 423

2. ESTOPPEL—TITLE TO PROPERTY—OSTENSIBLE OWNERSHIP. A son purchasing an automobile in his father's name is not estopped by that fact to assert title, as against a judgment creditor of his father, purchasing at execution sale; since such judgment creditor is not an innocent purchaser for value, and can assert only the title which the judgment debtor had. *Hartford v. Stout*..... 241

Evidence:

Incorporation in record on appeal, see APPEAL AND ERROR, 12.
To sustain verdict, sufficiency, see APPEAL AND ERROR, 19.
Harmless error in rulings on, see APPEAL AND ERROR, 22, 26-28.
Of self-defense, see ASSAULT AND BATTERY.
Of agreement by bank to make loan, see BANKS AND BANKING, 2.
Of forgery of check, see BANKS AND BANKING, 3.
Of authority of brokers to receive payment for goods, see BROKERS.
For personal injuries to passengers, see CARRIERS, 6.
Of contract by telephone, see CONTRACTS, 4.
Opinion evidence as to future results from injury, see DAMAGES, 2.
In action for divorce, see DIVORCE.
Necessity for condemning lands, see EMINENT DOMAIN, 10.
In action for damages to railroad by blasting for state highway, see EMINENT DOMAIN, 21.
Presentation of claim to executor, see EXECUTORS AND ADMINISTRATORS, 9.
Of consideration for decedent's promise to pay for services of foster son, see EXECUTORS AND ADMINISTRATORS, 10.
For personal injuries on highway, see HIGHWAYS, 4.
Separate character of property, see HUSBAND AND WIFE, 1.
On insurance policy, see INSURANCE, 3, 6-8.
Of cancellation of lease, see LANDLORD AND TENANT, 1.
Of loss of profits through interruption of quiet enjoyment by interference with light, see LANDLORD AND TENANT, 7.
For injuries to servant in general, see MASTER AND SERVANT, 5.
Maintenance of nuisance by city, see MUNICIPAL CORPORATIONS, 7.
For personal injuries, see MUNICIPAL CORPORATIONS, 7, 8.
For personal injuries to trespasser, see RAILROADS, 2.
Ownership of property, see REPLEVIN.
In action for injury to pupil on playground, see SCHOOLS AND SCHOOL DISTRICTS, 2-4, 6.
Establishment of trust, see TRUSTS, 3.
For rescission of contract to sell land, see VENDOR AND PURCHASER, 2.
Prescriptive right to maintain dam, see WATERS AND WATER COURSES, 1.

Evidence—Continued.

1. EVIDENCE—PRESUMPTIONS—DUTY OF OFFICERS. It is proper to instruct that the law presumes that the official acts of public officers are properly performed. *Hill v. Calkins-Rice*..... 118

2. EVIDENCE—DECLARATIONS OF PARTY—LETTERS. In an action against a carrier for breach of a special contract to deliver goods at a certain destination within a specified time, letters written by the plaintiff to defendant are not admissible as self-serving declarations where they contained no reference to the contract, merely expressing anxiety to get the goods in time, a payment of charges under protest, and a statement of damages for delayed delivery. *Vittucci Co. v. Canadian Pac. R. Co*..... 686

3. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—AMBIGUITY. Where a contract for the sale of land fixed a time limit for the grantor to remove certain timber, without describing the timber or fixing the amount, it is ambiguous, and parol evidence is admissible as to the amount of timber reserved in the sale and subject to removal. *Ahlman v. Wilson* 677

4. EVIDENCE—OPINIONS—NONEXPERTS. Upon an issue as to deceit in misrepresenting past illness of an applicant for insurance who was tubercular, nonexpert evidence of his physical appearance and condition is admissible. *Askey v. New York Life Insurance Co*... 27

5. EVIDENCE—EXPERT EVIDENCE—SAFE METHOD OF WORK. An expert witness may testify as to whether it was a safe method of unloading logs to use a Marion loader placed upon a track at the side of and parallel with the track upon which the loaded car was placed. *Jones v. Chicago, Milwaukee & St. Paul R. Co*..... 120

Exceptions:

Necessity for purpose of review, see APPEAL AND ERROR, 5, 11.

Exceptions, Bill of:

Recitals in as to appearance, see APPEAL AND ERROR, 15.

Excessive Assessment:

See TAXATION, 1.

Exchange of Property:

1. EXCHANGE OF PROPERTY—IMPROVEMENTS—REIMBURSEMENT. Parties given permissive possession pending inspection and acceptance of an offer to exchange properties, which failed of consummation, acquire no rights by voluntary improvements and payment of interest, especially where they deprived the owners of the use of their property for a long time. *Nelson v. Davis*..... 313

Executors and Administrators:

Testamentary trustees, see TRUSTS, 6-8; WILLS, 1.

1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT—DEBTS—ASSIGNMENT BY HEIRS. Since the fact of no debts can be established only by the appointment of an administrator and notice to creditors, it is error to refuse to appoint an administrator for an estate consisting only of a promissory note which had been assigned by all the heirs of the deceased, since Rem. Code, § 1364, provides that the property of the deceased shall be subject to the payment of debts; and it is not enough that an heir testified that he was positive that the deceased left no debts. *In re Collins' Estate*..... 697

2. EXECUTORS AND ADMINISTRATORS—CONTRACTS—CONSIDERATION. An executory agreement by an executor to buy from himself, in his trust capacity, a half interest in certain property and apply the proceeds to the payment of a legatee, who had no interest in the property, is not enforcible as a claim against the executor, where the contract was wholly unperformed through the refusal of the court to order the sale, and the property was subsequently sold by the successor of the executor, who never received any interest in it; since there was no benefit to the promisor and no detriment to the promisee. *Gates v. Herr*..... 131

3. SAME. An executor's conditional promise to pay a legacy if the court would by its order legalize a sale by himself as executor to himself, is not enforcible as an executor's promise to pay a legacy from an estate possessed of sufficient assets, where the court did not make the order. *Gates v. Herr*..... 131

4. EXECUTORS AND ADMINISTRATORS—CLAIMS — PRESENTATION — SUFFICIENCY. A claim against the executors of a deceased surety upon a supersedeas bond is insufficient where it consisted merely of the presentation of an abstract of the judgment, and was not verified by oath, as required by Rem. Code, § 1473. *Empson v. Fortune*.... 16

5. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—BURDEN OF PROOF. Upon an issue as to whether a claim had been duly presented to an executor, the burden of proof is upon the claimant. *In re King's Estate* 299

6. EXECUTORS AND ADMINISTRATORS—CLAIMS — JOINDER — NECESSITY. The presentation of a claim for moneys expended does not bar the filing, within the time limited by law, of another claim for services rendered, where the two claims were upon separate accounts for different subject-matters; since they need not be joined. *Olsen v. Hagan* 321

7. SAME — CLAIMS—PRESENTATION—WAIVER. The due presentation of a claim against the estate of a deceased person cannot be waived by the executor or administrator. *Empson v. Fortune*..... 16

Executors and Administrators—Continued.

8. SAME—CLAIMS—WAIVER. The surrender of notes to a decedent in her lifetime does not constitute a waiver of a claim against the estate, where no equivalent was given and the payee was justified in assuming that decedent would subsequently provide for the indebtedness by will or otherwise. *Olsen v. Hagan*..... 321

9. SAME—CLAIMS—PRESENTATION—EVIDENCE—SUFFICIENCY. A finding that a claim was not presented to an executor is sustained, where the story of plaintiff's presentation of the claim while walking on the street to the executor's home, without exacting any receipt, is flatly contradicted and without corroboration, while the executor's testimony was corroborated in some respects, and plaintiff made no inquiry as to the matter for three years, and not until sued by the executor. *In re King's Estate*..... 299

10. EXECUTORS AND ADMINISTRATORS—CLAIMS—CONTRACT FOR SERVICES—EVIDENCE—SUFFICIENCY. A decedent's promise to pay a foster son for past services is supported by a sufficient consideration, where she had promised her dying husband to make the payment, she had taken her husband's separate and community estate burdened with the promise, and there was a moral obligation on her part to carry it out. *Olsen v. Hagan*..... 321

11. EXECUTORS AND ADMINISTRATORS — ORDER TO SELL REAL ESTATE—CONSTRUCTION. An order in probate, directing the executor to "immediately mortgage or sell" a portion of the estate, contemplates that he take the necessary steps provided by statute for that purpose. *In re Ferguson's Estate*..... 148

Exhibits:

As part of record on appeal, see APPEAL AND ERROR, 13.
Demand for, see PLEADING, 3.
Waiver of objections to at trial, see TRIAL, 2.

Expert Testimony:

In civil actions, see EVIDENCE, 4, 5; SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Express Trusts:

See TRUSTS, 1-4.

Extra Work:

Performance of by contractor as releasing surety, see PRINCIPAL AND SURETY, 9.

Fees:

Recovery of fees paid for unearned licenses, see INTOXICATING LIQUORS.
Of trustees, see TRUSTS, 6-9.

Fellow Servants:

See MASTER AND SERVANT, 6.

Filing:

Of statement by proponents of recall, see OFFICERS, 2.
Claims against estate of deceased surety, see PRINCIPAL AND SURETY, 6.
Mechanics' liens, see RAILROADS, 1.
Schedule of rates for telephone service, see TELEGRAPHS AND TELEPHONES, 5.

Final Judgment:

Appealability, see APPEAL AND ERROR, 3.

Findings:

Exceptions to for purpose of review, see APPEAL AND ERROR, 5.
Review on appeal, see APPEAL AND ERROR, 20, 21.
As to public necessity for condemnation, see EMINENT DOMAIN, 9.

Fire Insurance:

See INSURANCE, 1, 4, 10.

Fish:

1. FISH—LICENSE—RIGHTS OF ALIENS—STATUTES AND PROCLAMATIONS—WAR. The fact that the country is at war with Austria-Hungary does not impel the suspension of Rem. Code, § 5150-43, entitling actual residents of the state who have declared their intention to become citizens of the United States to a fishing license; since the President's proclamation of war between the United States and Austria-Hungary, of December 11, 1917, merely prohibits subjects of that country from entering or leaving the country, and declares that, so long as they conduct themselves according to law, they shall be undisturbed in the pursuit of their occupations, as friendly aliens on a different footing from the subjects of Germany. *State ex rel. Constanti v. Darwin*..... 402

2. SAME. The fact that such subjects are not now entitled to become citizens of the United States on account of the war, under U. S. Comp. St. 1916, § 4362, is immaterial; since it cannot be said that the intention of Rem. Code, § 5150-43, was to confine the right to those entitled to become citizens at the time they apply for a license to fish. *State ex rel. Constanti v. Darwin*..... 402

Fixtures:

1. FIXTURES—LEASE—CONSTRUCTION. Under a lease of a natatorium building requiring the lessee to install equipment, and providing that such personal property and equipment shall immediately become the property of the lessor as additional consideration for the lease, all the furniture and fixtures become the property of the lessor. *Hills v. Stimson Co*..... 1

Forcible Entry and Detainer:

1. FORCIBLE ENTRY AND DETAINER—RELIEF — AMENDMENT OF COMPLAINT. An action for unlawful detainer may not, by amendment of the complaint, be changed, over the defendant's objection by demurrer thereto, to an action for equitable relief; and the court having jurisdiction only by a strict compliance with the statute, has no power to grant injunctive relief. *State ex rel. Seaborn Shipyards Co. v. Superior Court* 215

Foreclosure:

Of lien, see LIENS.
Redemption from mortgage foreclosure, see MORTGAGES, 2-4.

Forfeiture:

Of insurance, see INSURANCE, 2, 4-6.

Forgery:

Payment of forged check, see BANKS AND BANKING, 3-6.

1. FORGERY—INDICTMENT—INTENT TO DEFRAUD—SUFFICIENCY. An information for forgery, setting forth the instrument as forged with intent to defraud is sufficient without stating the names of the persons defrauded; in view of Rem. Code, § 2303, providing that it is not necessary to prove intent to defraud any particular person, and Id., § 2292, providing that where an intent to defraud is an element of the offense, it is sufficient to prove an intent to defraud any person whatsoever. *State v. Thomas* 564

Former Adjudication:

See JUDGMENT, 4-7.

Franchise:

For use of city streets, see TELEGRAPHS AND TELEPHONES, 1-5.

Fraud:

In application for insurance, see INSURANCE, 4-9.
In sale of note and mortgage, see MORTGAGES, 1.
Sales of realty, see VENDOR AND PURCHASER, 2.

1. FRAUD—SETTLEMENT—CONCEALMENT—ISSUES. Where a settlement was made of an option contract prior to defendant's sale of the subject-matter, plaintiff, suing to set aside and entirely evade the settlement, is not entitled to an instruction that it was defendant's duty to notify plaintiff of the sale. *Brown v. Jamison* 124

Frauds, Statute of:

Parol evidence to establish trust, see TRUSTS, 3.

1. FRAUDS, STATUTE OF — DEBT OF ANOTHER — DIRECT PROMISE. A verbal promise by representatives of a railroad contractor and the railroad to see that certain subcontractors were paid, if the main

Frauds, Statute of—Continued.

subcontractor did not pay them, is not sufficient to create an original or collateral undertaking and is void under the statute of frauds. *Dixon v. Parker, Moran & Parker* 101

2. FRAUDS, STATUTE OF—SALE OF GOODS—MEMORANDUM—SUFFICIENCY. A memorandum of an order for the sale of goods describing the thing sold, the names of the parties, price and terms of payment, signed by the party charged, meets the requirements of the statute of frauds, though informal and containing abbreviations which it is necessary to explain by oral evidence. *Nut House v. Pacific Oil Mills* 114

3. FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM—DESCRIPTION—SUFFICIENCY. An offer to exchange "¾ of an acre on Bridge Street" in a certain city fails to satisfy the statute of frauds in that it contains no sufficient description of the land. *Nelson v. Davis* 313

4. FRAUDS, STATUTE OF—SALE OF LANDS—MEMORANDUM—DESCRIPTION—SUFFICIENCY. The statute of frauds requiring a contract for a broker's commission to be in writing is not satisfied by a writing describing the "Hillcrest ranch below Pullman," of 907 acres "more fully described as parts of sections 17, 18, 19 and 20 in township 13, range 44." *Larue v. Farmers & Mechanics Bank* 434

Fraudulent Conveyances:

Preferences by bankrupt, see BANKRUPTCY.

Garnishment:

Orders reviewable, see APPEAL AND ERROR, 1.

Grade:

Change of grade in city street, see MUNICIPAL CORPORATIONS, 1, 2.

Grants:

Of easements, see DEEDS.
Of easement for waterway, see NAVIGABLE WATERS.
Of water rights, see WATERS AND WATER COURSES, 2, 3.

Guaranty:

See PRINCIPAL AND SURETY.
As to fitness of premises for use intended, see LANDLORD AND TENANT, 4.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 22-31.

Highways:

Liability of state for injury to property by construction of highway, see EMINENT DOMAIN, 13-21.

Highways—Continued.

1. HIGHWAYS—ESTABLISHMENT—PRESCRIPTION—TRAILS. The adverse use of a trail by travelers on foot and horseback and by pack trains and "go-devils," consisting of two poles dragged by horses, for the transportation of goods, for over thirty years, constitutes the same a highway by prescription, although the same was not used by wheeled vehicles. *Hamp v. Pend Oreille County*..... 184

2. SAME—ESTABLISHMENT BY PRESCRIPTION—WIDTH. A highway by prescriptive use of a trail by travelers on foot and horseback is not limited to the actual path traveled, twenty-four inches or less, but may be fixed at twelve feet, where such width is reasonably necessary for the public easement, required for passing as well as traveling in one direction. *Hamp v. Pend Oreille County*..... 184

3. HIGHWAYS—ESTABLISHMENT—NOTICE—TO MINORS—JURISDICTION—EMINENT DOMAIN. Under Rem. Code, § 5633, requiring notice to be given to property owners of proceedings by county commissioners to establish a county road, the court acquires no jurisdiction of eminent domain proceedings to condemn the land of a minor for whom no guardian *ad litem* was appointed in the preliminary proceedings, since notice of the hearing as to the necessity and route and award of damages by the commissioners was jurisdictional as to such minor; and the objection is available on certiorari to review the proceedings in eminent domain. *State ex rel. Davies v. Superior Court* 395

4. HIGHWAYS—INJURIES—CONTRIBUTORY NEGLIGENCE—APPARENT DANGERS—EVIDENCE—SUFFICIENCY. Plaintiff, injured in the overturning of his load of hay, cannot recover from the county, where it appears that the accident happened through his manner of loading and driving, rather than to the fact that there was a dangerous grade and a rock in the road, and the hay and rack would not have slipped off if the wheels had been kept in the ordinary tracks, and the dangers were open and apparent. *Crooks v. Stevens County*..... 231

Husband and Wife:

See DIVORCE.

1. HUSBAND AND WIFE—SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY—PRESUMPTION AS TO PROPERTY ACQUIRED AFTER MARRIAGE. Where a husband negotiated for property, took the deed in his wife's name, directed that the word homestead be indorsed on the margin of the deed, and for twenty-two years thereafter never interfered with his wife's management and control of the property, and no rights of creditors intervened, there was sufficient confirmation of the wife's testimony that it was the intention that she hold it as her separate property apart from the community; such course of conduct confirming the claim of one spouse being sufficient to overcome the presumption that all property acquired after marriage is community property. *Lanigan v. Miles*..... 82

Husband and Wife—Continued.

2. HUSBAND AND WIFE — COMMUNITY PROPERTY — LIABILITY ON HUSBAND'S BOND. The husband's gratuitous bond is not a community debt where it was not given in a community enterprise. *Kanters v. Kotick* 523

3. HUSBAND AND WIFE—WIFE'S SEPARATE DEBT—CONSIDERATION FOR NOTE—HUSBAND'S DEBT. In view of Rem. Code, §§ 5925-5927, removing all disabilities imposed by the common law upon married women, extension of time for payment of the husband's separate debt is a sufficient consideration for the wife's note and mortgage binding her separate property. *Knickerbocker Co. v. Hawkins* 582

4. HUSBAND AND WIFE—ACTIONS—JUDGMENT—SEPARATE OR COMMUNITY DEBT. In an action against partners conducting a mercantile business in the interest of the community on *prima facie* community debts, in the absence of evidence to overcome the presumption, it is error to enter judgment against a husband "as a separate judgment only." *Tacoma Association of Credit Men v. Lyons*..... 213

Improvements:

Right to reimbursement for, pending acceptance of offer to exchange property, see EXCHANGE OF PROPERTY.

Public improvements, see MUNICIPAL CORPORATIONS, 13.

Indemnity:

See PRINCIPAL AND SURETY.

Indictment and Information:

See FORGERY.

Charging crime of accepting earnings of prostitute, see PROSTITUTION, 2.

Industrial Insurance:

See MASTER AND SERVANT, 1-3.

Injunction:

Power of courts to enjoin dissolution of voluntary clearing house association, see BANKS AND BANKING, 1.

Enjoining unlawful interference with competition, see CONTRACTS, 1.

To restrain use of lands wrongfully taken and put to public use, see EMINENT DOMAIN, 23.

Right to injunctive relief in action of unlawful detainer, see FORCIBLE ENTRY AND DETAINER.

1. INJUNCTION—UNLAWFUL OCCUPATIONS—PARTIES SPECIALLY INTERESTED—MUNICIPAL CORPORATIONS—JITNEYS — REGULATION. A street car company having a franchise to carry passengers for hire in a city may maintain an action to enjoin, as unlawful interference therewith, the carriage of passengers, cutting down its revenues, by motor vehicles in defiance of Rem. Code, § 5562-37 *et seq.*, regu-

Injunction—Continued.

lating the privilege and requiring as a condition precedent that such carriers give a bond to protect passengers against personal injuries; and it is immaterial that the company has no interest in the bond. *Puget Sound Traction, Light & Power Co. v. Grassmeyer* 482

2. SAME—RESTRAINING NUISANCE—UNLAWFUL OCCUPATIONS—JITNEYS. Such action is maintainable, since to engage in any form of business in defiance of laws regulating the same is a nuisance *per se*, to be enjoined by any one suffering a special injury thereby; even though there be legal remedy by arrest and punishment. *Puget Sound Traction, Light & Power Co. v. Grassmeyer*..... 482

3. INJUNCTION—UNLAWFUL OCCUPATIONS—PARTIES SPECIALLY INTERESTED. Where the sole business of a street railway company is derived from the fares collected from passengers carried, any deprivation of such fares is an interference with its property and special damages if in violation of law, entitling the company to injunctive relief. *Puget Sound Traction, Light & Power Co. v. Grassmeyer* 482

4. INJUNCTION—UNLAWFUL OCCUPATION—JITNEY BUSSES. In injunction to restrain the operation of jitney busses in violation of a city ordinance, an answer that defendant's motor vehicles are not operated as jitney busses, states a good defense. *Puget Sound Traction, Light & Power Co. v. Grassmeyer*..... 482

Insane Persons:

Sale of property of at tax sale, see TAXATION, 2, 3.

1. INSANE PERSONS—ACTIONS AGAINST—DEFENSES—PLEADING. Purchasers at a tax sale and sale under execution of property of an incompetent person, suing to quiet title, must recover on the strength of their own title; hence defendant's guardian *ad litem* may rely on general denials without pleading affirmative defenses. *Whitaker v. Ellis* 43

Insolvency:

Unlawful preference to creditor by insolvent, see BANKRUPTCY.

Inspection:

Of lands by purchaser, see VENDOR AND PURCHASER, 2.

Instructions:

Incorporation in record on appeal, see APPEAL AND ERROR, 14.
Harmless error in giving or refusing, see APPEAL AND ERROR, 29-31.
In civil actions, see TRIAL, 3, 4.

Insurance:

Industrial insurance, see MASTER AND SERVANT, 1-3.

1. INSURANCE—INSURABLE INTEREST—TITLE—CONDITIONAL SALE—RELIEF IN EQUITY. Where a conditional sales contract required the ven-

Insurance—Continued.

dee to insure the property for the benefit of the vendor, the policy inures to the benefit of the vendor, and the insurance company, with notice or put on inquiry, cannot in equity complain of reformation of the policy or decree protecting the vendor to the extent of the unpaid purchase price. *Robbins v. Milwaukee Mechanics Insurance Co.* 539

2. INSURANCE—LIFE INSURANCE—PAYMENT OF PREMIUM. Under Rem. Code, § 6059-180, providing that no life insurance company shall make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy, and Id., § 6059-184, providing that the policy and application shall constitute the entire contract between the parties, a policy of life insurance is avoided where the full premium was not paid in advance as required by the terms of the policy and it was paid to a soliciting agent who had no right to receive it because he did not deliver a receipt therefor as specified in the contract, and it was not shown that the company ever received the premium. *Gibson v. New York Life Insurance Co.* 180

3. SAME—POWERS OF AGENT—EVIDENCE—DOCUMENTS. Upon trial of action on a life insurance policy, evidence of only part of the contract to show the agent's authority is properly excluded, where his powers could be determined only by the entire contract. *Gibson v. New York Life Insurance Co.*.....180

4. INSURANCE — AVOIDANCE OF POLICY—TITLE—MISREPRESENTATIONS—"INTENT TO DECEIVE." Under Rem. Code, § 6059-34, providing that misrepresentations or warranties shall not avoid a policy of insurance unless made with intent to deceive, a fire policy on pool tables issued to the vendee in a conditional sales contract is not defeated by the insured's want of title, where he informed the insurance agent that he had not paid for the tables, the conditional sales contract was on record, and the agent was put on inquiry as to the state of the legal title. *Robbins v. Milwaukee Mechanics Insurance Co.* 539

5. INSURANCE — LIFE INSURANCE—APPLICATION—WARRANTY—STATUTE —INTENT TO DECEIVE. Misrepresentations as to previous illness by an applicant for life insurance will not vitiate the policy, under Rem. Code, § 6059-34, providing that no misrepresentation or warranty in the negotiation of the contract shall be deemed material or defeat the policy, unless it was made with intent to deceive; it being necessary to prove the intent. *Askey v. New York Life Insurance Co.* 27

6. INSURANCE—ACTION ON POLICY — MISREPRESENTATIONS—EVIDENCE—ADMISSIBILITY. In an action on a life insurance policy, upon an issue as to good faith and lack of intent to deceive in misrepresenting a past illness of an applicant for insurance who was tubercular, declarations by the insured, confirming the statements in his appli-

Insurance—Continued.

cation that his past trouble was pneumonia, made at a time when he was not contemplating insurance, are admissible, in view of Rem. Code, § 6059-34, making the insured's intent to deceive the controlling question in avoiding a policy because of false statements in the application. *Askey v. New York Life Insurance Co*..... 27

7. SAME—ACTION ON POLICY—MISREPRESENTATIONS — INTENT TO DECEIVE—EVIDENCE—ADMISSIBILITY. In an action on a life insurance policy, the death certificate filed by the plaintiff is not proof of any disease suffered by the deceased four or five years prior to death, and while a *prima facie* admission and evidence of statements as to past health, it is not proof of insured's intent to deceive. *Askey v. New York Life Insurance Co*..... 27

8. SAME — ACTION ON POLICY—FRAUD—EVIDENCE OF CHARACTER—ADMISSIBILITY. In an action upon a policy of insurance, defended on the ground of fraud by the insured in making his application, evidence as to the insured's character as to truth and veracity is admissible on the issue as to his intent to deceive. *Askey v. New York Life Insurance Co*..... 27

9. SAME — MISREPRESENTATIONS — INTENT TO DECEIVE—QUESTION FOR JURY. Intent to deceive in misrepresenting past illness to be pneumonia when it was tuberculosis, made by an applicant for life insurance, who some time later died of tuberculosis, is a question for the jury, where it appears that insured had gone to California on the advice of a physician, who after a careful examination found no evidence of tubercular trouble, the wife and mother testified that there were no indications thereof, and the agent testified that he had no appearance thereof. *Askey v. New York Life Insurance Co*. 27

10. SAME—ACTION FOR LOSS—PROOFS OF LOSS—WAIVER. The question of waiver of proofs of loss is a question for the jury, where it appears that the insured furnished the adjuster all itemized statements and information desired by the adjuster and was misled into believing that nothing further was necessary. *Robbins v. Milwaukee Mechanics Insurance Co*..... 539

Intent:

To defraud, see FORGERY.

To deceive, as avoiding policy of insurance, see INSURANCE, 4-9.

Interest:

Right to reimbursement for, pending acceptance of offer to exchange property, see EXCHANGE OF PROPERTY.

Insurable interest, see INSURANCE, 1.

Allowance of in action for rescission, see VENDOR AND PURCHASER, 3.

1. INTEREST—CONTRACT. In an action on contract, interest should be allowed from the date the same was due and not from the date of the judgment. *Dixon v. Parker, Moran & Parker*..... 101

Intoxicating Liquors:

1. INTOXICATING LIQUORS—LICENSE—RECOVERY OF FEES — VOLUNTARY PAYMENT. Where, in order to close out its business when the state wide prohibition law was to go into effect on January 1, 1916, a brewing company was compelled to take out a state license for the fiscal year commencing July 1, 1915, the payment for the full year was not a voluntary payment, and the fees exacted by the state for the last half of the term during which the license could not be used may be recovered from the state, regardless of whether they were paid under protest or not. *Olympia Brewing Co. v. State*... 494

Issues and Proof:

In civil actions, see TRIAL, 3, 4.

Jitneys:

Enjoining operation of in violation of law, see INJUNCTION.
Regulation of in cities of first class, see MUNICIPAL CORPORATIONS, 4-6.

Joinder:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6.

Judges:

Misconduct of as harmless error, see APPEAL AND ERROR, 25.
Discretion in granting new trial, see NEW TRIAL.

1. JUDGES — POWERS — SUCCESSOR IN OFFICE—GRANT OF NEW TRIAL. Upon the death of the judge who tried the case, his successor in office has the same power and discretion to grant a new trial as the predecessor had, in view of Rem. Code, § 67, providing that no proceeding is affected by a vacancy in the office of the judge, and the fact that courts are continuing governmental entities. *Carkonen v. Columbia & Puget Sound R. Co.*..... 11

2. JUDGES—AFFIDAVIT OF PREJUDICE—HEARING. Under Rem. Code, § 209-1, requiring a judge, on filing an affidavit of prejudice, to "forthwith" enter an order for a change of venue, the court may, where an investigation is necessary, continue the cause until such times as the investigation may be properly made. *State ex rel. Giles v. French* 273

3. SAME—DISQUALIFICATION—CALLING IN JUDGE. Under Rem. Code, § 209-1, requiring a judge, upon the filing of an affidavit of prejudice, to change the venue or call in a new judge, his power is not exhausted by a single attempted exercise thereof; but having determined to call in another judge in the court of original jurisdiction he cannot subsequently change the venue to another court. *State ex rel. Giles v. French* 273

Judgment:

Review, see APPEAL AND ERROR.

Entry of against sureties on supersedeas bond, see APPEAL AND ERROR, 38, 39.

Estoppel by judgment and failure to appeal, see ESTOPPEL, 1.

Separate or community debt, see HUSBAND AND WIFE, 4.

Mandamus to compel court to proceed to final judgment, see MANDAMUS, 2.

Prohibition to prevent entry of, see PROHIBITION, 2.

1. JUDGMENT—ORDERS—EX PARTE. After appearance by a party, it is error to enter an *ex parte* order, as the statute entitles the parties to notice of all proceedings. *State ex rel. Giles v. French*..... 273

2. JUDGMENT—VACATION—GROUNDS—MISTAKE OF CLERK. A judgment may be vacated for the mistake, neglect or omission of the clerk, in entering findings and judgment, contrary to the directions of the judge to hold them, after they were signed and given to the clerk. *Hartford v. Stout* 241

3. SAME — VACATION — NOTICE — WAIVER. A voluntary appearance without objection to trial of the merits of the motion waives notice of proceedings to vacate a judgment required by Rem. Code, § 468. *Hartford v. Stout*..... 241

4. SAME — BAR — PARTIES CONCLUDED. Such consent judgment on settlement of the suit is not binding upon the defendant as to the item dismissed out of the case without prejudice, where such item was dismissed because it was the personal obligation of the manager of the company, who was not a party to the suit and had no interest in the judgment compromised. *Nebraska Investment Co. v. Corlett* 151

5. JUDGMENT — RES JUDICATA — MATTERS CONCLUDED. A judgment denying injunctive relief growing out of an alleged violation of a contract, on the ground that mutual mistake had neither been properly pleaded, nor sufficiently proved if pleaded, is *res adjudicata*, and a bar to a subsequent action between the same parties to reform the contract on the ground of mutual mistake; since the merits were, or might have been, litigated in the former action. *Tacoma Mill Co. v. Northern Pac. R. Co*..... 95

6. JUDGMENT—BAR—MATTERS CONCLUDED—SET-OFF. Judgment in an action by assignees, in which the defendant pleaded, but could not recover, an offset it had against the assignor over and above the amount of the assigned claim, is not a bar to an action by the former defendants against the assignor for the balance due over and above the offset allowed in the former action. *Nut House v. Pacific Oil Mills*..... 114

7. JUDGMENT—BAR—MATTERS CONCLUDED. A judgment on consent, vacating the judgments appealed from and all appeals taken, pur-

Judgment—Continued.

suant to a settlement, and not mentioning an item dismissed without prejudice, is not a bar to a subsequent action thereon; nor would the holder be barred by failure to appeal, since it could accept the ruling allowing independent action. *Nebraska Investment Co. v. Corlett*..... 151

Judicial Power:

Laws combining legislative, administrative and judicial powers, see CONSTITUTIONAL LAW, 1.

Jurisdiction:

Appellate jurisdiction, see APPEAL AND ERROR, 1-3.
Disbarment proceedings, see ATTORNEY AND CLIENT.
Amount in controversy, see CERTIORARI.
Of courts, see COURTS.
Of proceedings to condemn land of minor for highway, see HIGHWAYS, 3.
Prohibition to prevent erroneous exercise of, see PROHIBITION, 1.

Jury:

Instructions in civil actions, see TRIAL, 3, 4.

Knowledge:

As affecting assumption of risks by servant, see MASTER AND SERVANT, 9, 10.

Landlord and Tenant:

Surrender of leased premises by bankrupt as preference, see BANKRUPTCY.
Right of lessor to fixtures under terms of lease, see FIXTURES.

1. LANDLORD AND TENANT—LEASE—CANCELLATION — EVIDENCE — SUFFICIENCY. In an action for rent, the evidence sustains findings that the lease was not canceled but remained in force until the end of the term, where it appeared that a reduction in rent was agreed upon for the first three months of the last year, and upon further oral negotiations, rent at the reduced rate was paid and accepted monthly in full for the rent of each month. *Samson Investment Co. v. Thompson Furniture Co*..... 661

2. LANDLORD AND TENANT — CONDITION OF PREMISES — LIABILITY OF LANDLORD. Under a lease of a hotel building to be constructed according to plans and specifications, the maxim of *caveat emptor* applies, and the tenant cannot recover damages and loss of rental value through defects in the heating plant and seepage of water in the basement walls, where the building was constructed according to the plans and specifications. *Robinson v. Wilson*..... 528

3. SAME. Inadequacy of the plans would not constitute a breach of the lease, nor would inadequacy of the heating plant or seepage in the walls be evidence of breach. *Robinson v. Wilson*..... 528

Landlord and Tenant—Continued.

4. SAME—LEASE—USE OF PREMISES—GUARANTY OF FITNESS. Under a lease of a hotel building containing no restrictions as to its use, a guaranty of the fitness of the building for hotel purposes cannot be implied. *Robinson v. Wilson*..... 528

5. SAME—REPAIRS—PERFORMANCE BY TENANT—WAIVER. The voluntary act of a landlord in making repairs to a heating plant does not waive his right to a strict performance of the lease by the tenant. *Robinson v. Wilson*..... 528

6. LANDLORD AND TENANT—INTERRUPTION OF QUIET ENJOYMENT—MEASURE OF DAMAGES. The measure of damages for an interruption of quiet enjoyment by interference with light is the difference between the value of the property as furnished and the rent reserved, or the diminished value of the use of the property; loss of profits being usually regarded as too remote and speculative, unless proof of profits is so clear that they were, as a matter of law, within the contemplation of the parties. *Matzger v. Arcade Building & Realty Co.*..... 423

7. SAME. The evidence of loss of property is not sufficient to bring a case within the exception to such rule, where the tenant's business was not interrupted, he complained only that facilities for carrying it on were not so good as before, and there was nothing to show how much of the lost profits was due to the use of artificial lights, how much to plaintiff's partner being in a rival business, or how much to personal elements in the management of plaintiff's business and the sale of his goods. *Matzger v. Arcade Building & Realty Co.*..... 423

Lands:

Covenants running with land, see COVENANTS, 1.
Contracts relating to lands, see FRAUDS, STATUTE OF, 3, 4.
Trusts in, see TRUSTS, 2, 3.

Last Clear Chance:

To avoid injury to person on track, see RAILROADS, 2.

Leases:

See LANDLORD AND TENANT.
Right of lessor to fixtures under terms of lease, see FIXTURES.

Legacy:

See WILLS, 3, 4.

Legislative Power:

Laws combining legislative, administrative and judicial powers, see CONSTITUTIONAL LAW, 1.

Letters:

As evidence in civil action, see EVIDENCE, 2.

Levy:

Of city taxes, see MUNICIPAL CORPORATIONS, 15.

Licenses:

To fish, see FISH.

For sale of intoxicating liquors, see INTOXICATING LIQUORS.

Liens:

Right of subcontractor to equitable relief on failure to file lien, see MUNICIPAL CORPORATIONS, 2.

Liability of surety for undischarged liens for materials furnished contractor, see PRINCIPAL AND SURETY, 1.

Mechanics' liens, see RAILROADS, 1.

1. LIENS — FORECLOSURE—SALE—TITLE—PARTIES CONCLUDED. Where the sheriff took a taxicab from the possession of a city by virtue of notice and proceedings in foreclosure of a chattel lien thereon, under Rem. Code, §§ 1104-1109, and the city failed to contest the matter by removing the foreclosure to the superior court as it might have done under the statute, it cannot claim that the foreclosure sale is irregular or replevy the property from the sheriff on account of irregularity or minor defects which should have been determined by the superior court if the city claimed any interest in the property. *Everett v. McCulloch*..... 51

Life Insurance:

See INSURANCE, 2, 3, 5-9.

Limitation:

On notice to bank of payment of forged check, see BANKS AND BANKING, 5.

On levy of tax, see MUNICIPAL CORPORATIONS, 15.

Limitation of Actions:

Accrual of action for breach of covenant of warranty, see COVENANTS, 2, 3.

To enforce trust, see TRUSTS, 4.

1. LIMITATION OF ACTIONS — STATUTES — APPLICATION TO EQUITY. Under Rem. Code, § 153, abolishing all distinctions between actions at law and equity by providing a single form of action, and Id., § 155, providing that actions can only be commenced within the periods prescribed after the cause accrues, and Id., §§ 156, 157, 159, and 165, providing limitations for actions for the recovery of real estate, on contract, in writing and not in writing, and for fraud, and for relief not thereinbefore provided for, the statute of limitations will be applied by courts of equity as it would be applied at law, except as

Limitation of Actions—Continued.

between the trustee and *cestui que trust* of a direct, express, continuing trust in the exclusive jurisdiction of a court of equity, in which case the statute does not run as long as the trust subsists. *Hotchkin v. McNaught-Collins Improvement Co.* 161

Loans:

See BANKS AND BANKING, 2.

Machinery:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 5, 9.

Mandamus:

1. MANDAMUS—WHEN LIES—TO COURTS—SCOPE OF RELIEF—CRIMINAL LAW—SENTENCE. Mandamus will not issue to compel the superior court to pronounce sentence upon a plea of guilty while the accused has the right at any time prior to final judgment to ask leave to withdraw the plea, under Rem. Code, § 2111, or to move in arrest of judgment under Id., § 2183. *State ex rel. Lundin v. Superior Court* 600

2. SAME. Mandamus lies to compel the superior court to proceed to final judgment upon a plea of guilty in a criminal case, upon suspending sentence without authority; since its action was a refusal to proceed to final judgment, rather than the mere commission of error. *State ex rel. Lundin v. Superior Court*..... 600

3. MANDAMUS—WHEN LIES—TO PUBLIC SERVICE CORPORATIONS—TELEGRAPHS AND TELEPHONES. The users of a telephone service have a right to apply to the courts for a writ of mandate to compel the company to perform its contract obligations, there being nothing in the public service commission act requiring that they seek a remedy before any special tribunal. *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.* 196

Marriage:

Conditions of bequest as imposing restraint on marriage, see WILLS, 3.

Married Women:

See HUSBAND AND WIFE.

Master and Servant:

Action for services, see WORK AND LABOR.

1. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION OF REMEDIES—"PLANT." Giving a liberal construction to the proviso to Rem. Code, § 6604-1, which gives a workman entitled to industrial insurance the election to take under the act or to sue third persons for injuries occurring "away from the

Master and Servant—Continued.

plant" of the employer, the "plant" of a street railway company does not include its street car tracks in a city street; hence its employee, run down by an automobile while engaged in oiling the tracks, is entitled to make the election. *Carlson v. Mock*..... 557

2. SAME—WORKMEN'S COMPENSATION—PARTIAL DISABILITY—RIGHT TO BENEFIT. Where it is conceded that a beneficiary seeking recovery for "permanent partial disability" under Rem. Code, § 6604-5 (f) of the workmen's compensation act, is suffering from neurosis or hysterical paralysis to such an extent as to be partially disabled, although he may recover, he is entitled to the benefits of Id., § 6604-5 (d), providing for cessation of benefits upon recovery and the continuance of proportionate payments so long as the present earning power is only partially restored. *Parker v. Industrial Insurance Department* 54

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION — DECISION OF INSURANCE DEPARTMENT—APPEAL—STATUTES. Questions going to the classification of an injured workman, and his right to participate in the insurance fund, are subject to review on appeal from the insurance department as "questions of fact," within the meaning of Rem. Code, § 6604-20, providing for appeals in so far as a department decision rests upon questions of fact; "questions of fact" meaning all facts necessary to be determined before a workman is classed as a beneficiary, and matters of "discretion," as to which there is no appeal, referring to matters pertaining to the administration of the fund after a workman is classified. *Parker v. Industrial Insurance Department* 54

4. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—BRIDGES —CLEARANCE. In an action for the death of a brakeman, struck by a railroad bridge while leaning out to inspect a hot box, a railroad company is not negligent in maintaining the bridge with a clearance of only two feet, where that was the standard construction and employees were not required to be upon the side of the cars or engines when passing over the bridge. *Ball v. Northern Pac. R. Co.* 668

5. SAME—INJURIES TO SERVANT—DEFECTIVE LOCOMOTIVES. In an action for the death of a brakeman, struck by a railroad bridge while leaning out to inspect a hot box, evidence that the engine was leaking steam to such an extent as to obscure the deceased's view of the bridge, and that it began to leak steam shortly after leaving the roundhouse and the condition became worse as the trip progressed, is sufficient to take the case to the jury upon the question of negligence in the operation of an engine in a defective condition, and whether that was the proximate cause of the death. *Ball v. Northern Pac. R. Co.*..... 668

6. MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE—DUTY TO WARN. In an action for personal injuries inflicted by starting

Master and Servant—Continued.

up the engine of a steam thresher without warning while plaintiff was in a place of danger cleaning out the separator, the fellow servant doctrine is not in issue, since it was a nondelegable duty of the master to give a warning of the starting of the machinery under such circumstances. *Daraveleas v. Morrison*..... 8

7. SAME—INJURIES TO SERVANT—DUTY TO WARN. In such a case, the failure of the engineer to warn the deceased when the train was approaching the bridge, was not negligence, where there was no negligence in failing to sooner discover his position, and as soon as it was discovered the engineer called to him and attempted to stop the train. *Ball v. Northern Pac. R. Co*..... 668

8. MASTER AND SERVANT — INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY. Upon an issue as to whether a servant's fall from a car of logs was due to a sudden jerk of the car, or to his stepping and slipping upon a piece of loose bark, the question is for the jury, where the testimony was conflicting and its credibility was for the jury to decide. *Jones v. Chicago, Milwaukee & St. Paul R. Co.* 120

9. MASTER AND SERVANT — DANGEROUS APPLIANCES — ASSUMPTION OF RISKS—MACHINES IN COMMON USE. A power company using a generator of a type in common use in electrical power plants is not liable because improvements have been made upon generators by which varying loads can be better taken care of without sparking at the commutator; and an experienced employee assumes the risk from the known tendency of the particular generator to dangerously spark while carrying a load. *Griffith v. Washington Water Power Co.* 78

10. MASTER AND SERVANT—ASSUMPTION OF RISKS—INSTRUCTIONS. Instructions as to a servant's assumption of risks properly state that it must appear that he knew and appreciated the danger, and that an order to do an act involving peril to himself is an assurance of safety and may be obeyed, unless the danger is so obvious and imminent that no person of ordinary care would encounter it. *Jones v. Chicago, Milwaukee & St. Paul R. Co*..... 120

Measure of Damages:

See DAMAGES, 1.

For interruption of quiet enjoyment by interference with light, see LANDLORD AND TENANT, 6, 7.

For loss through mistake in sending telegram, see TELEGRAPHS AND TELEPHONES, 6.

Mechanics' Liens:

Liability of railroad company, see RAILROADS, 1.

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF, 2-4.

Method of Work:

Opinion evidence as to safe method of unloading logs, see EVIDENCE, 5.

Mines and Minerals:

Construction of option to buy mining stock, see CORPORATIONS, 1.

Minors:

Notice of proceedings to establish highway, see HIGHWAYS, 3.

Misrepresentation:

By insured, see INSURANCE, 4-9.
Inducing sale of note and mortgage, see MORTGAGES, 1.
Of vendor on sale of land, see VENDOR AND PURCHASER, 2.

Mistake:

Of clerk as ground for vacation of judgment, see JUDGMENT, 2.
In transmission of message, see TELEGRAPHS AND TELEPHONES, 6.

Money Paid:

Recovery of tax paid, see TAXATION, 3.

Mortgages:

1. MORTGAGES—REMEDIES OF ASSIGNEE — RESCISSION — FRAUD. The sale of a note and mortgage may be rescinded by the purchaser for fraud where he asked for and received assurance that the security was ample, relying on false representations inducing the sale. *Tyner v. Stults* 168

2. MORTGAGES—FORECLOSURE—REDEMPTION—RENTS AND PROFITS—ACCOUNTING. Under Rem. Code, § 594 *et seq.*, providing a method of redemption, but providing that one in possession shall account for rents and profits, one who demands an accounting from the sheriff within the period of redemption may maintain an action for an accounting, notwithstanding that he might have pursued an accounting through the sheriff. *Cogswell v. Brown*..... 625

3. SAME—REDEMPTION—DAMAGES FOR WASTE. Where plaintiffs, instead of redeeming at law from a mortgage foreclosure, seek an accounting in equity for rents and profits during the period of redemption, they cannot exact the penalty of treble damages provided by Id., §§ 939, 940, for waste in cutting timber, but must be satisfied with their actual damages. *Cogswell v. Brown*..... 625

4. SAME — REDEMPTION — ACCOUNTING FOR WASTE—SCOPE OF RELIEF. Where a part of the mortgaged premises bid in by the mortgagee was sold during the period of redemption to B. for a less sum than the amount due, and B. committed waste by the removal of the timber, upon an accounting to the redemptioner, the equities between B. and the mortgagee are to be adjusted by the decree. *Cogswell v. Brown* 625

Motor Vehicles:

City motor carriers of passengers for hire, see MUNICIPAL CORPORATIONS, 4-6.

Municipal Corporations:

Right of street railway company to maintain action to enjoin operation of jitneys in violation of law, see INJUNCTION.

Use of streets for telephone lines, see TELEGRAPHS AND TELEPHONES, 1-5.

Water supply, see WATERS AND WATER COURSES, 2, 3.

1. MUNICIPAL CORPORATIONS—CHANGE OF GRADE—POLICE POWER—CONTRACTOR'S BOND—NECESSITY. An ordinance requiring a railroad company to make a separation of street grades is an exercise of the general police power, and the duty of performance placed upon the railroad company is traceable thereto and not to a contractual assumption by the railway company; hence Rem. Code, § 1159 *et seq.*, requiring the city to take a bond from contractors on public work has no application thereto. *Dixon v. Parker, Moran & Parker*.. 101

2. MUNICIPAL CORPORATIONS — RAILROADS — LOSS OF LIEN — EQUITY. Where there was no privity and no lien filed, the fact that a subcontractor's work on a separation of grades was a benefit to the city and the railroad company, would not render either liable in equity, the contractor having been paid in full. *Dixon v. Parker, Moran & Parker*..... 101

3. MUNICIPAL CORPORATIONS—STREETS—VACATION—TIDE LANDS—STATUTES. Under Rem. Code, § 7842, providing that the property within the limits of a vacated street shall revert to the abutting owners, one-half to each, where a vacated street intersected the land platted diagonally, forming triangular shaped lots, the abutting owner's lines should be extended in straight lines to the center of the vacated street; and the same rule applies whether the lots be tide lands or uplands. *State ex rel. Patterson v. Superior Court*.... 331

4. MUNICIPAL CORPORATIONS—STREETS—JITNEYS—REGULATION. A "for hire" license, under Rem. Code, § 5562-1, does not authorize the carriage of passengers for hire in cities of the first class, until the owner has complied with Id., § 5562-37, *et seq.*, requiring, as a condition precedent, the giving of a bond to protect passengers from personal injuries. *Puget Sound Traction, Light & Power Co. v. Grassmeyer* 482

5. SAME. Rem. Code, § 5562-37 *et seq.*, requiring a bond for the protection of passengers in motor vehicles operated for hire in cities of the first class, applies whether the vehicles are operated over fixed routes or not. *Puget Sound Traction, Light & Power Co. v. Grassmeyer* 482

Municipal Corporations—Continued.

6. SAME—USE OF STREETS—MOTOR VEHICLES—REGULATION—BONDS—CONSTITUTIONAL LAW—DUE PROCESS—EQUAL PROTECTION OF LAWS. The jitney bus act, Rem. Code, § 5562-37 *et seq.*, requiring city motor carriers of passengers for hire to give a security bond executed by a qualified surety company, is not invalid because of the fact that there are no qualified surety companies from which such bonds are obtainable; since the state in the exercise of its police power can prohibit the use of the streets as a place of private business. *Puget Sound Traction, Light & Power Co. v. Grassmeyer*..... 482

7. MUNICIPAL CORPORATIONS — TORTS — MAINTENANCE OF NUISANCE—EVIDENCE—SUFFICIENCY. Where a wading pool in city playgrounds was cleaned and drained each Friday, the fact that a broken bottle was found therein on Sunday is not sufficient to charge the city with maintaining a nuisance or render it liable for injuries sustained by a child, cut by the broken glass, there being no evidence of notice of the glass, either actual or constructive. *Clark v. Seattle*..... 228

8. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained upon a defective sidewalk, photographs introduced to meet the city's contention that the street was not a public thoroughfare are not inadmissible because they show a changed condition, a new board put in place of the old board which was already in the case as an exhibit. *Fitzgerald v. Centralia* 586

9. MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian, struck by an automobile while he was hurrying across a street sixty feet from a crossing, without looking in the direction from which the automobile approached, it is not error to refuse requested instructions that a pedestrian is not bound to stop, look and listen, etc., and that he was not bound to anticipate an automobile coming from the south on the left-hand side of the street, etc., where, by other instructions, the jury were properly instructed as to the law of the road and care required in using the left-hand side of the street, and on the subject of contributory negligence by pedestrians. *Johnson v. Bloedel* 293

10. SAME. In such a case, an instruction that plaintiff could not recover, if it was found that he attempted to run across the street in front of a moving street car, and in so doing failed to use his faculties for his own safety and collided with defendant's car, is not error, when taken in connection with other proper instructions defining contributory negligence. *Johnson v. Bloedel*..... 293

11. MUNICIPAL CORPORATIONS—WARRANTS—ASSIGNMENT. Purchasers of municipal warrants take subject to all defenses that may be made against them. *State ex rel. State Bank of Seattle v. Scott*..... 510

Municipal Corporations—Continued.

12. SAME—WARRANTS—VALIDITY. A municipal warrant is not issued or valid until delivered into the hands of the person authorized to receive it. *State ex rel. State Bank of Seattle v. Scott*..... 510

13. SAME — PUBLIC IMPROVEMENTS — CONTRACTS — RIGHT OF ASSIGNEE AND SURETY ON CONTRACTOR'S BOND. A city contractor may, prior to default, assign installments due and payable from the city, and the rights of the assignee being superior to those of the surety upon the contractor's bond completing the work, the city cannot subsequently issue valid warrants therefor to the surety. *State ex rel. State Bank of Seattle v. Scott*..... 510

14. SAME. Such warrants would be invalid, even in the hands of purchasers without notice through the assignee's failure to file or give written notice of the assignment. *State ex rel. State Bank of Seattle v. Scott*..... 510

15. MUNICIPAL CORPORATIONS—TAXATION — LEVY FOR INDEBTEDNESS — LIMITATIONS—STATUTES. Rem. Code, § 7653, relating to tax levies by cities of the second class and providing a limit only for levies for general purposes, was not intended to impliedly repeal, but must be taken *in pari materia* with, Rem. Code, § 5131, as originally enacted, and as amended subsequent to the passage of § 7653, and which fixes a limit for levies to pay outstanding indebtedness, in accordance with the harmonious policy of the laws respecting limitation upon the powers of all cities in this respect. *Benn v. Grays Harbor County* 620

Navigable Waters:

1. NAVIGABLE WATERS—CONTRACTS—WATERWAYS. An agreement between adjoining owners of tide lands for a waterway, "each party to keep open, maintain and use" its half, is the grant of a cross-easement of a positive and negative character, the word "use" being intended to require each party to dock its vessels upon its own side, rather than to forbid its use of the whole waterway for passage. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.* 608

Necessity:

For findings of fact, see APPEAL AND ERROR, 20.
For taking land for public use, see EMINENT DOMAIN, 4, 5, 7-10.

Negligence:

Of depositor, on payment of forged check by bank, see BANKS AND BANKING, 4.
Of carrier in allowing snow and ice on platform of street cars, see CARRIERS, 6.
Cause of injury on highway, see HIGHWAYS, 4.
Of employers, see MASTER AND SERVANT.

Negligence—Continued.

Cause of personal injuries in city street, see MUNICIPAL CORPORATIONS, 8-10.
Of person injured on street, see MUNICIPAL CORPORATIONS, 9, 10.
Trespasser on railroad property, see RAILROADS, 2.
Of school district in maintenance of playground appliances, see SCHOOLS AND SCHOOL DISTRICTS, 2, 6.
Telegraph or telephone companies, see TELEGRAPHS AND TELEPHONES, 6.

Negotiable Instruments:

See BILLS AND NOTES.

New Trial:

Review of order denying motion for, see APPEAL AND ERROR, 2.
Review of rulings on, see APPEAL AND ERROR, 16, 18.
Power of successor to grant, see JUDGES, 1.

1. NEW TRIAL—DISCRETION—ON DEATH OF JUDGE. An order by a succeeding judge granting a new trial because against the weight of the evidence, is not shown to have been without the exercise of his discretion because his opinion shows that he sought to ascertain the opinion of his predecessor in office, where it further shows that he gave the fullest consideration to the evidence and determined the matter upon the entire record and exercised his own discretion. *Carkonen v. Columbia & Puget Sound R. Co.*..... 11

Nonintervention Wills:

See WILLS, 1.

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Of appeal, see APPEAL AND ERROR, 9, 10.
Of payment of forged check, see BANKS AND BANKING, 5, 6.
Of claim against contractor's bond, see COUNTIES.
Establishment of highway, see HIGHWAYS, 3.
Of proceedings to vacate judgment, waiver, see JUDGMENT, 3.
To surety of default of principal, see PRINCIPAL AND SURETY, 5.
Of lien for labor and material furnished subcontractor, see RAILROADS, 1.
Purchaser of real property, see VENDOR AND PURCHASER, 5.

Nuisance:

Enjoining unlawful occupation as nuisance *per se*, see INJUNCTION, 2.
Liability of city, see MUNICIPAL CORPORATIONS, 7.

Objections:

Necessity for purpose of review, see APPEAL AND ERROR, 4.
To evidence, see TRIAL, 2.

Occupation:

Enjoining unlawful occupation, see INJUNCTION.

Officers:

Corporate officers, see CORPORATIONS, 3.
Presumptions as to proper performance of acts of public officers, see EVIDENCE, 1.
Per diem compensation, see TIME.
Conversion of property by corporate trustees, see TROVER AND CONVERSION.

1. OFFICERS—RECALL—PETITION—SUFFICIENCY — CONSTITUTIONAL AND STATUTORY PROVISIONS. Under Const., amend. 8, art. 1, § 33, authorizing the recall of an elective officer for malfeasance or misfeasance in office, and Rem. Code, § 4940-1, requiring the charge to state the acts complained of in concise language, a charge against a county commissioner stating in detail facts showing a malfeasance in office by the violation of Rem. Code, § 2334, which makes it a gross misdemeanor to be beneficially interested in a contract to purchase lands for the county, is sufficient, although the charge is of misfeasance rather than malfeasance; since an incorrect designation of the offense would not invalidate the recall petition. *Thiemens v. Sanders* 453

2. SAME. Under Rem. Code, § 4940-8, requiring petitioners for the recall of an elective officer to file a statement giving the names and addresses of all persons who have contributed or aided and the amount contributed by each, and a detailed statement of all expenditures, the county auditor must file a statement if duly verified, without investigating its truth; and that there are a number of names without cash contributions does not invalidate the petition. *Thiemens v. Sanders* 453

Opening:

Judgment, see JUDGMENT, 2, 3.

Opinion Evidence:

In civil actions, see DAMAGES, 2; EVIDENCE, 4, 5; SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Option:

To buy corporate stock, see CORPORATIONS, 1.

Oral Contracts:

See FRAUDS, STATUTE OF.

Order of Proof:

At trial, see TRIAL, 1.

Orders:

Review of, see APPEAL AND ERROR, 1-3.
Of public service commission, review, see CARRIERS, 1.
In probate to sell real estate, see EXECUTORS AND ADMINISTRATORS, 11.
Ex parte orders, see JUDGMENT, 1.

Ordinances:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

Overcharge:

Review of order of public service commission for repayment by carrier, see CARRIERS, 1.

Ownership:

Of property, sufficiency of evidence, see REPLEVIN.

Parol Contracts:

See FRAUDS, STATUTE OF.

Parol Evidence:

In civil actions, see EVIDENCE, 3.
To establish trust, see TRUSTS, 3.

Parties:

Death ground for abatement, see ABATEMENT AND REVIVAL.
Substitution on death of party pending appeal, see APPEAL AND ERROR, 6.
Obligees in bonds on appeal, see APPEAL AND ERROR, 7, 8.
Right of assignee to sue as real party in interest, see ASSIGNMENTS.
Entitled to question validity of contract, see CONTRACTS, 1.
Rights and liabilities as to costs, see COSTS.
Right to injunctive relief, see INJUNCTION, 1-3.
Persons concluded by judgment, see JUDGMENT, 4.
Persons concluded by foreclosure sale, see LIENS.
Entitled to institute mandamus proceeding, see MANDAMUS, 3.
Action against surety, see PRINCIPAL AND SURETY, 4.
Liable for accepting earnings of prostitute, see PROSTITUTION, 1.
Persons entitled to reward, see REWARDS.

1. PARTIES—SUBSTITUTION—STATUTES. The probate code, Laws 1917, p. 674, § 116, providing for the substitution of parties in actions pending against a decedent at the time of his death, applies to actions pending in the superior court, and does not repeal Rem. Code, § 1743, relating to substitutions in the supreme court upon the death of party after final judgment in the superior court. *Mohney v. Davis* 158

Passengers:

Carriage of, see CARRIERS, 6.

Payment:

Of forged check, see BANKS AND BANKING, 3.
To broker, evidence of authority, see BROKERS.
Rights acquired by voluntary payment of interest pending acceptance of offer to exchange property, see EXCHANGE OF PROPERTY.
Of insurance premium, see INSURANCE, 2.
Whether excess license fee was voluntary payment, see INTOXICATING LIQUORS.
As releasing surety, see PRINCIPAL AND SURETY, 8.
Taxes, see TAXATION, 3.
Of debt by legacy, see WILLS, 4.

Performance:

Part performance of escrow agreement, see ESCROWS, 2.
Tender of as condition precedent to action on bond, see PRINCIPAL AND SURETY, 3.
By principal contractor as releasing surety on subcontractor's bond, see PRINCIPAL AND SURETY, 7.
Of conditions of reward, see REWARDS.

Personal Injuries:

To passenger, see CARRIERS, 6.
Opinion evidence as to future results from, see DAMAGES, 2.
To traveler on highway, see HIGHWAYS, 4.
To employee, see MASTER AND SERVANT.
To child on city playground, see MUNICIPAL CORPORATIONS, 7.
To person on city street, see MUNICIPAL CORPORATIONS, 8-10.
To person on or near railroad tracks, see RAILROADS, 2.
To child on playground, see SCHOOLS AND SCHOOL DISTRICTS, 1-7.

Petition:

Description of lands in condemnation proceedings, see EMINENT DOMAIN, 22.
For recall of officers, see OFFICERS.

Plant:

Injury to workman occurring away from plant of employer, see MASTER AND SERVANT, 1.

Pleading:

See INJUNCTION, 4.
In action by shipper for breach of contract to deliver goods, see CARRIERS, 2, 3.
Right to change action by amendment of complaint asking equitable relief, see FORCIBLE ENTRY AND DETAINER.
In action against insane person to quiet title, see INSANE PERSONS.

1. PLEADING—AMENDMENTS — AFTER RETRIAL — COUNTERCLAIM AFTER ADMISSIONS. Under Rem. Code, § 273, permitting a defendant to set

Pleading—Continued.

forth as many defenses and counterclaims as he may have, and Id., § 303, authorizing the court to allow amendments, it is discretionary to allow amendments to an answer, upon retrial after remand from the supreme court. *Smith Sand & Gravel Co. v. Corbin* 306

2. SAME—AMENDMENTS — NEW DEFENSE — CONSISTENCY — CONSTRUCTION. An amendment to an answer setting up a counterclaim for abandonment and breach of contract, not made on the former trials, is not inconsistent with the original answer admitting a specified sum as due for work done under the contract, and offering to submit to judgment therefor; since the amendment contained no denials of the original admissions. *Smith Sand & Gravel Co. v. Corbin* 306

3. PLEADING—EXHIBITS—DEMAND. A motion for an order requiring defendants to furnish a copy of a written contract pleaded by them, is a sufficient "demand in writing" as required by Rem. Code, § 284, and is "upon notice," within Id., § 1262. *Gates v. Herr*..... 131

Police Power:

Of municipality, see MUNICIPAL CORPORATIONS, 1.

Policy:

Of insurance, see INSURANCE.

Powers:

Of supreme court to recall remittitur and vacate judgments, see APPEAL AND ERROR, 33.

Of superior court to enter judgment against sureties on supersedeas bond, see APPEAL AND ERROR, 39.

Of state board of law examiners in disbarment proceedings, see ATTORNEY AND CLIENT.

Of courts to enjoin dissolution of voluntary clearing house association, see BANKS AND BANKING, 1.

Of trustees, see CORPORATIONS, 3.

Of court to suspend sentence, see CRIMINAL LAW, 1.

Of court to grant injunctive relief in unlawful detainer action, see FORCIBLE ENTRY AND DETAINER.

Of successor in office, see JUDGES, 1.

Of city to grant telephone franchise controlling rates for service, see TELEGRAPHS AND TELEPHONES, 1, 2.

Practice:

See APPEAL AND ERROR; CRIMINAL LAW; PLEADING; TRIAL.

Preferences:

Of creditors by insolvent, see BANKRUPTCY.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 22-31.
Of judge, see JUDGES, 2, 3.

Premises:

Defective premises, liability of landlord, see LANDLORD AND TENANT. 2-4.

Premiums:

For insurance, see INSURANCE, 2.

Prescription:

Establishment of highways, see HIGHWAYS, 1, 2.
Acquisition of water rights, see WATERS AND WATER COURSES, 1, 3.

Presentment:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 4-7, 9.

Presumptions:

On appeal, see APPEAL AND ERROR, 22.
As to nature of easement, see EASEMENTS.
In civil actions, see EVIDENCE, 1.
As to status of property acquired after marriage, see HUSBAND AND WIFE, 1.
As to payment of debt by legacy, see WILLS, 4.

Principal and Agent:

See BROKERS.
Insurance agents, see INSURANCE, 3, 4.

Principal and Surety:

Liability of surety on supersedeas bond, see APPEAL AND ERROR. 36-39.
Sureties on contractor's bond, see MUNICIPAL CORPORATIONS, 13; STATES.

1. PRINCIPAL AND SURETY—CONTRACTOR'S BOND—LIABILITY OF SURETY—LIENS TO BE DISCHARGED. A surety upon a subcontractor's bond for the faithful performance of a state contract and full protection to the state against mechanics' liens and other claims, under Rem. Code, § 4326, is liable for claims duly filed with the state board for materials furnished prior to default the fairness of which was not questioned, although they had not yet been paid. *Finne v. Maryland Casualty Co.* 651

2. SAME—LIABILITY OF SURETY—DEFENSE. A surety cannot be held liable upon a bond where the principal was not liable because the conditions for which it was given could not be performed. *Kanters v. Kotick* 523

Principal and Surety—Continued.

3. PRINCIPAL AND SURETY—ACTION ON BONDS—CONDITIONS PRECEDENT —TENDER OF PERFORMANCE. Tender of a conveyance is a condition precedent to an action upon a bond given to secure performance of the agreement of the vendees to discharge a mortgage as consideration for the conveyance, as the stipulations are mutual and concurrent. *Kanters v. Kotick* 523

4. PRINCIPAL AND SURETY — ACTION AGAINST SURETY — PARTIES. A surety in a joint and several bond may be sued separately from the principal, under Rem. Code § 192, giving plaintiff the option to sue all or any of the persons severally liable upon the same obligation. *Kanters v. Kotick* 523

5. PRINCIPAL AND SURETY — CONTRACT—SUBCONTRACTOR'S BOND—NOTICE OF BREACH—SUFFICIENCY. A surety company is given sufficient notice of the principal's breach of the contract, where, having no agent in the city, a registered letter and telegram were sent to its home office giving notice of the breach, and that it would be necessary to take over the work and requesting what it proposed to do about it. *Houghton v. Hoy* 358

6. PRINCIPAL AND SURETY—RELEASE OF CO-SURETY—FAILURE TO FILE CLAIM AGAINST ESTATE. The failure to present a claim against the executor of the estate of a deceased surety upon a supersedeas bond does not release the other surety from liability on the bond, where suit was brought against the surviving surety within the year limited to creditors for filing claims against the estate of the deceased surety, and in time to enable the surviving surety to protect his right to contribution from the estate by filing his claim therefor. *Empson v. Fortune* 16

7. PRINCIPAL AND SURETY—RELEASE OF SURETY—CONTRACTOR'S BOND—CONDITIONS. The surety upon a subcontractor's bond, entitled to notice and opportunity to complete the work, is not released from liabilities as they existed at the time of the default by reason of the principal contractor's assuming control and completing the work after giving notice of the default, where no burden or liability was imposed upon the surety on account of such completion of the work. *Finne v. Maryland Casualty Co.* 651

8. SAME—RELEASE OF SURETY—CONTRACTOR'S BOND—OVERPAYMENTS. Under a subcontractor's bond providing for retention of a percentage of the value of all work performed until complete performance, the surety is not released by payments during the progress of the work in excess of the amount due, where they were necessary to protect the property from lien claims and did not prejudice the surety, and more than the amount of the reserved fund had been used to pay creditors and diminish the liability of the surety. *Finne v. Maryland Casualty Co.* 651

Principal and Surety—Continued.

9. SAME—RELEASE—EXTRAS. A compensated surety on construction work is not released because the work included extras, where the extras were provided for in the contract. *Houghton v. Hoy*.... 358

Probate:

Allowance of costs in contest over management of estate, see COSTS.

Process:

On appeal, see APPEAL AND ERROR, 9, 10.

Proclamations:

Of war as affecting right of aliens to fishing license, see FISH.

Profits:

Right of stockholder to recover lost profits, upon dispossession of business, see CORPORATIONS, 2.

Prohibition:

1. PROHIBITION—WHEN LIES—TO COURTS. Prohibition lies to prevent a superior court, having jurisdiction only for the purpose of determining issues in unlawful detainer, from granting injunctive relief, under an attempted amendment over defendant's objection. *State ex rel. Seaborn Shipyards Co. v. Superior Court*..... 215

2. PROHIBITION — WHEN LIES — TO COURTS — ERRONEOUS JUDGMENT. Prohibition does not lie to prevent the court from entering a judgment in an action to restrain an execution sale, according to findings made after trial, upon refusing to admit further proof, where the judgment would at most be merely erroneous, the court having jurisdiction of the parties and the subject-matter. *State ex rel. Rose v. Ralston* 268

Promise:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

Promissory Notes:

See BILLS AND NOTES.

Proof:

Of loss insured against, see INSURANCE, 10.
Order of proof at trial, see TRIAL, 1.

Property:

See FIXTURES.
Taking or damaging for public use, see EMINENT DOMAIN.
Estoppel to assert title to, see ESTOPPEL, 2.
Offer to exchange property, see EXCHANGE OF PROPERTY.
Separate or community nature of, see HUSBAND AND WIFE, 1, 2.

Property—Continued.

Protection of rights of property by injunction, see INJUNCTION.
Ownership of, see REPLEVIN.
Subject of conversion, see TROVER AND CONVERSION.

Prostitution:

1. PROSTITUTION—ACCEPTING EARNINGS—PERSONS LIABLE. Rem. Code, § 2240, punishing "every person" who shall live with or accept any earnings of a prostitute, includes females as well as males. *State v. Kelly* 265

2. SAME—INFORMATION—SUFFICIENCY. In a prosecution for accepting the earnings of a prostitute, it is not necessary for an information in the language of the statute to state the purpose for which the earnings were accepted. *State v. Kelly*..... 265

Proximate Cause:

Of injury to servant, see MASTER AND SERVANT, 5, 8.

Public Debt:

Limitation on, see MUNICIPAL CORPORATIONS, 15.

Public Improvements:

By municipalities, see MUNICIPAL CORPORATIONS, 13.

Public Service Commission:

Review of orders of, see CARRIERS, 1.
Relief to telephone company from contract obligations to users of service, see TELEGRAPHS AND TELEPHONES, 4, 5.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Pupils:

Injury to pupil on playgrounds, see SCHOOLS AND SCHOOL DISTRICTS, 1-7.

Quantum Meruit:

See WORK AND LABOR.

Question for Jury:

Negligence in allowing snow and ice on platform of street car, see CARRIERS, 6.
Intent to deceive, in application for insurance, see INSURANCE, 9.
Waiver of proofs of loss, see INSURANCE, 10.
In action for injury to servant, see MASTER AND SERVANT, 8.
Negligence in maintenance of playground slide, see SCHOOLS AND SCHOOL DISTRICTS, 6.

Quieting Title:

Action against insane person, pleading defenses, see INSANE PERSONS.

Railroads:

Carriage of goods and passengers, see CARRIERS.
Contract for railroad construction, see CONTRACTS, 3.
Appropriation of property, see EMINENT DOMAIN, 1, 10.
As employers, see MASTER AND SERVANT, 4, 5, 7, 8, 10.
Requiring company to make separation of street grades, see MUNICIPAL CORPORATIONS, 1, 2.
Compensation of receivers, see RECEIVERS.

1. RAILROADS—CONSTRUCTION CONTRACTS—BOND—MECHANICS' LIENS—NOTICE—NECESSITY. The failure of a railroad company to take a bond from a contractor, under Rem. Code, § 1129, to respond in lieu of a lien, renders the company liable *in personam*, as provided by the act, for labor and materials furnished to subcontractors; but only when a lien has been duly filed therefor as required by the statute; this liability being only a statutory substitute for the lien *in rem* against specific property, to be perfected by the filing of notice of lien as required by Rem. Code, § 1134, when no bond was given. *Dixon v. Parker, Moran & Parker*..... 101

2. RAILROADS—TRESPASSERS—"LAST CLEAR CHANCE"—EVIDENCE—SUFFICIENCY. The doctrine of the last clear chance does not apply to a case where a young man, sitting on the edge of a railroad track, was killed by a passenger train, where it appears that the noise of the train could have been heard for three minutes before the accident, and the brakes were set for the emergency stop 600 feet away when the engineer realized that he was not going to get out of the way, and the train brought to a stop within 800 feet; since the mere presence of a trespasser, even if seen, is not alone enough to set the doctrine in motion, as the engineer may assume that a trespasser will take some account of his own safety. *Schommers v. Great Northern R. Co.*..... 206

Rates:

Telephone rates, see TELEGRAPHS AND TELEPHONES, 1-5.

Recall:

Of remittitur, see APPEAL AND ERROR, 33-35; COURTS, 2.
Of officers, see OFFICERS.

Receivers:

1. RECEIVERS—COMPENSATION—AMOUNT. Two receivers of an interurban railway will be allowed a compensation of $500 per month each, not on a percentage basis which is obsolete, but in view of the amount involved, the obligations attending it, the amount of the bond required, the time spent, labor and skill needed, the fidelity to details, the expedition of administration, and the character of the accounting; it appearing that both the receipts and disbursements

Receivers—Continued.

were over $1,200,000, the management efficient, much construction work done, and a great deal of important litigation conducted. *Crawford v. Seattle, Renton & Southern R. Co.*..... 386

Recitals:

In bill of exceptions on appeal, see APPEAL AND ERROR, 15.

Records:

On appeal, see APPEAL AND ERROR, 11-15; CRIMINAL LAW, 3.
Estoppel by record, see ESTOPPEL, 1.
Of stipulations, necessity for review, see STIPULATIONS.
As notice to purchaser, see VENDOR AND PURCHASER, 5.

Redemption:

From mortgage, see MORTGAGES, 2-4.
Of lands of insane person, see TAXATION, 3.

Regulation:

Of carrier, see CARRIERS, 1.
Of jitney busses, see INJUNCTION, 1.
Of jitneys in cities of first class, see MUNICIPAL CORPORATIONS, 4-6.

Reimbursement:

Of purchaser of lands of insane person, see TAXATION, 3.

Release:

See COMPROMISE AND SETTLEMENT.
From liability as surety, see PRINCIPAL AND SURETY, 6-8; STATES, 1.

Remand:

Amendment to answer on retrial after remand from supreme court, see PLEADING, 1.

Remedy at Law:

Effect on jurisdiction of equity, see INJUNCTION, 2.

Remittitur:

Recalling remittitur, see APPEAL AND ERROR, 33-35; COURTS, 2.

Removal:

Of trustee, see TRUSTS, 5.

Rent:

See LANDLORD AND TENANT, 1, 2.
Accounting for rents and profits during period of redemption, see MORTGAGES, 2-4.

Reopening Case:

See TRIAL, 1.

Repairs:

On premises demised, see LANDLORD AND TENANT, 5.

Repeal:

Of statute rendering school district liable for torts, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Of statute giving cities of first class power to grant franchise, see TELEGRAPHS AND TELEPHONES, 3.

Replevin:

Property sold on foreclosure of chattel lien, see LIENS.

1. REPLEVIN — OWNERSHIP OF AUTOMOBILE — EVIDENCE — SUFFICIENCY. In an action of replevin of an automobile, purchased in the name of a father, the evidence sufficiently shows that it was in fact owned by his son, where it appears that he paid for it, and for the state license fee, insurance, and costs of maintenance, and that the title was taken in his father's name for the sake of convenience only. *Hartford v. Stout*..... 241

Rescission:

Of sale of note and mortgage for fraud, see MORTGAGES, 1.

Of contract for sale of land, see VENDOR AND PURCHASER, 1-3.

Res Judicata:

See JUDGMENT, 4-7.

Retroactive Laws:

See STATUTES.

Retroactive effect of laws authorizing condemnation of state property, see EMINENT DOMAIN, 3.

Revenue:

See TAXATION.

Reversion:

Of property on vacation of street, see MUNICIPAL CORPORATIONS, 3.

Review:

See CERTIORARI.

In civil actions, see APPEAL AND ERROR.

Of order of public service commission for repayment of overcharge by carrier, see CARRIERS, 1.

In criminal prosecutions, see CRIMINAL LAW, 2-3.

Rewards:

1. REWARDS — PERSONS ENTITLED — COMPLIANCE WITH CONDITIONS. Where a reward is offered for the apprehension, arrest and conviction of an unknown offender, his apprehension and arrest is the principal factor, and if the person making the arrest upon suspicion

Rewards—Continued.

aids in furnishing evidence which results in conviction, there is a substantial compliance with the conditions, and he is entitled to the whole reward, although he called in others who obtained evidence as to the offender's identification. *Hall v. State*..... 519

Riparian Rights:

Condemnation for public water supply, see EMINENT DOMAIN, 5-7.

Risks:

Assumed by employee, see MASTER AND SERVANT, 9, 10.

Roads:

See HIGHWAYS.
Streets in cities, see MUNICIPAL CORPORATIONS, 1, 3-6, 8-10.

Safe Place to Work:

See MASTER AND SERVANT, 4-6.

Salary:

Per diem compensation of officers, see TIME.

Sales:

Of corporate stock, see CORPORATIONS, 1.
Orders in probate to sell real estate, see EXECUTORS AND ADMINISTRATORS, 11.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.
Insurance for benefit of vendor in conditional sale contract, see INSURANCE, 1.
On foreclosure of chattel lien, see LIENS.
Of note and mortgage, see MORTGAGES, 1.
Tax sales, see TAXATION, 2, 3.
Of realty, see VENDOR AND PURCHASER.

1. SALES—CONDITIONAL SALES—ASSIGNMENT. An absolute bill of sale by the vendee in a conditional sales contract conveys only his interest, and amounts to no more than an assignment of the conditional sales contract. *Robbins v. Milwaukee Mechanics Insurance Co.* 539

Satisfaction:

See COMPROMISE AND SETTLEMENT.

Schedule:

Of rates for telephone service, see TELEGRAPHS AND TELEPHONES, 5.

Schools and School Districts:

Statute relating to actions against school district, see STATUTES.

1. SCHOOLS AND SCHOOL DISTRICTS—LIABILITY FOR TORTS—STATUTES—REPEAL. The school code (Rem. Code, § 4302 *et seq.*) providing for a general and uniform public school system, does not impliedly

Schools and School Districts—Continued.

repeal Id., § 951, rendering a school district liable for torts; in view of the fact that repeals by implication are not favored and that the act makes no reference to liabilities for torts. *Kelley v. School District No.* 71 343

2. SCHOOLS AND SCHOOL DISTRICTS—INJURY TO PUPIL—NEGLIGENCE. The negligence of a school district in maintaining a swing is sufficiently shown by the breaking of an iron ring of considerable thickness, which was used in one position until it was worn down at the point of contact to a thin edge, which finally gave way. *Kelly v. School District No.* 71 343

3. SCHOOLS AND SCHOOL DISTRICTS—TORTS—DANGEROUS PLAYGROUNDS—NEGLIGENCE—EVIDENCE—ADMISSIBILITY—EXPERTS. In an action for personal injuries to a child, sustained in a fall from a slide with a perpendicular ladder, instead of an inclined ladder with flat steps, the admission of the opinion evidence of experts to the effect that the latter would have been safer because the center of gravity in climbing the former falls outside the foot of the ladder, is not prejudicial error, where the jury viewed the ladder and would necessarily reach the same conclusion. *Holt v. School District No.* 71 442

4. SAME. In such an action, it is not error to allow playground experts to testify as to other apparatus used upon playgrounds with inclined ladders and chutes that were less dangerous as slides, and used for the same purpose. *Holt v. School District No.* 71..... 442

5. SCHOOLS AND SCHOOL DISTRICTS—INJURY TO PUPIL—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries to a child sustained through a defective playground swing, requested instructions on the subject of contributory negligence and assumption of risks are properly refused where they assumed that the child owed the duty of inspecting the swing. *Kelley v. School District No.* 71 343

6. SCHOOLS AND SCHOOL DISTRICTS—DANGEROUS PLAYGROUND APPARATUS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Negligence in the maintenance of a playground slide, with a perpendicular ladder, when an inclined ladder with flat steps, or some other kind of chute for slides, would have been safer, is a question for the jury, where a child nine years of age was seriously injured in a fall while attempting to make use of it. *Holt v. School District No.* 71... 442

7. SCHOOLS AND SCHOOL DISTRICTS—ACTIONS AGAINST—"MAINTAIN AN ACTION"—STATUTES. Laws 1917, p. 332, providing that no action shall be commenced or maintained against a school district for noncontractual acts or omissions of officers or employees relating to playgrounds, prohibits the plaintiff from prosecuting an appeal from an adverse judgment, after the taking effect of the law; since to prosecute an appeal is to maintain an action. *Foley v. Pierce County School District No.* 10 50

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8. SCHOOLS AND SCHOOL DISTRICTS—"RELIGIOUS" INSTRUCTION. The giving of credits for Bible study done outside of school, furnishing an outline of study, conducting examinations, and the rating of papers, covering the "historical, biographical, narrative and literary features of the Bible," violates Const., art. 1, § 11, providing that no public money shall be applied to any religious worship, exercise or instruction. *State ex rel. Dearle v. Frazier*..... 369

Seals:

Contracts under seal, see CONTRACTS, 2.

Self-Defense:

See ASSAULT AND BATTERY.

Self-Serving Declarations:

As evidence in civil actions, see EVIDENCE, 2.

Sentence:

Suspension of sentence, see CRIMINAL LAW, 1.
Mandamus to compel court to pronounce sentence, see MANDAMUS, 1.

Separate Estate:

Of spouse, see HUSBAND AND WIFE, 1.

Services:

Compensation of trustees, see TRUSTS, 8.

Set-off and Counterclaim:

Pleading matter of set-off or counterclaim, see PLEADING, 1, 2.

Settlement:

See COMPROMISE AND SETTLEMENT.
Fraud in settlement of option contract, see FRAUD.

Sidewalks:

Injuries from obstructions or defects, see MUNICIPAL CORPORATIONS, 8.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 12, 13.
By proponents of recall, filing of, see OFFICERS, 2.

States:

Condemnation of state property, see EMINENT DOMAIN, 2, 3.
Liability for damage to railroad by construction of highway, see EMINENT DOMAIN, 13-21.

1. STATES—CONTRACTOR'S BONDS—LIABILITY OF SURETY—SUBLETTING. Where a subcontract on a state building was not consented to or recognized by the state or bonding company, there was no such assignment or "subletting" as to release the surety on the con-

States—Continued.

tractor's bond, under the clause therein providing that the contractor shall not assign the contract or sublet any portion thereof without the written consent of the board of control and the bonding company; the clauses meaning only that there shall be no substitution of parties without the written consent of both the state and the surety. *Crane Co. v. Maryland Casualty Co.*..... 59

2. SAME—CONTRACTOR'S BONDS—LIABILITY OF SURETY—SUPPLIES TO SUBCONTRACTOR. A contractor's bond given under Rem. & Bal. Code, §§ 1159 and 1161, for the benefit of all laborers and materialmen and all persons "who furnish subcontractors with provisions and supplies" for carrying on the work, covers supplies furnished to any subcontractor which were actually used in the building. *Crane Co. v. Maryland Casualty Co.*..... 59

Statutes:

Substitution of party, on death of party pending appeal, see APPEAL AND ERROR, 6.

Disbarment proceedings, see ATTORNEY AND CLIENT.

Review of orders of public service commission, see CARRIERS, 1.

Suspension of sentence, see CRIMINAL LAW, 1.

Relating to after-acquired title of vendor, see DEEDS.

Condemnation of state property, see EMINENT DOMAIN, 2, 3.

Granting right of aliens to fishing license, see FISH.

Statute of frauds, see FRAUDS, STATUTE OF.

Avoidance of policy for breach of warranties by insured, see INSURANCE, 5.

Of limitations, see LIMITATION OF ACTIONS.

Appeals from decision of industrial insurance department, see MASTER AND SERVANT, 3.

Reversion to abutters of property, within vacated street, see MUNICIPAL CORPORATIONS, 3.

Tax levies by cities, see MUNICIPAL CORPORATIONS, 15.

Recall of elective officers, see OFFICERS.

Substitution of parties, see PARTIES.

Liability of school district for torts, see SCHOOLS AND SCHOOL DISTRICTS, 1, 7.

Power of city to grant telephone franchise, see TELEGRAPHS AND TELEPHONES, 1-3.

Accounting by trustees, see TRUSTS, 7.

1. STATUTES—CONSTRUCTION—RETROACTIVE EFFECT. Laws 1917, p. 332, § 1, providing that no action shall be "brought or maintained" against a school district for non-contractual acts or omissions of officers or employees relating to playgrounds owned or operated by the district does not apply to an action which had gone to judgment against the school district prior to the taking effect of the law in June, 1917, notwithstanding the pendency of an appeal by the

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defendant at that time; since the prevailing party is not "maintaining" an action by appearing and resisting the appeal. *Kelley v. School District No. 71* 343
Holt v. School District No. 71 442

Stipulations:

1. STIPULATIONS—WRITING. Stipulations not made in writing or in the record of the court cannot be considered. *Gordon v. Hillman* 411

Stock:

Corporate stock, see CORPORATIONS, 1.

Stockholders:

Of corporations, see CORPORATIONS, 2-4.

Street Railroads:

Injury to passengers from snow and ice on platform of street car, see CARRIERS, 6.
Right to restrain operation of jitney busses in violation of law, see INJUNCTION.

Streets:

See MUNICIPAL CORPORATIONS, 1, 3-6, 8-10.

Subletting:

Of contract as releasing surety, see STATES, 1.

Substitution:

On death of party pending appeal, see APPEAL AND ERROR, 6.
Of parties, see PARTIES.

Suit Money:

See DIVORCE.

Supersedeas:

On appeal, see APPEAL AND ERROR, 36-39.

Supplies:

Liability of surety to persons furnishing supplies to subcontractor, see STATES, 2.

Supreme Court:

Jurisdiction, see COURTS, 2, 3.

Suretyship:

See PRINCIPAL AND SURETY.

Suspension:

Of sentences in criminal prosecutions, see CRIMINAL LAW, 1.

Taxation:

Municipal taxes, see MUNICIPAL CORPORATIONS, 15.

1. TAXATION—VALUATION—EXCESSIVE ASSESSMENT. An assessment of tide lands, upon a zone system having reference to the value of the central unit, at $10,855, is excessive and not equal or uniform with other like property, where it appears that the tract consisted of 2.73 acres and had no practical value apart from the uplands, which were worth not to exceed, and could be bought for, $40 to $50 per acre, and other water front property was assessed at from $10 to $250 per acre. *East Aberdeen Land Co. v. Grays Harbor County*.... 172

2. TAXATION—TAX SALES—BONA FIDE PURCHASER—INSANE PERSON. Where property of an insane person was bid in at tax and execution sales, pursuant to negotiations between the insane person and persons who were bound to pay the taxes, who procured friends to bid in the property at much less than it was worth, and caused the same to be transferred to another friend who knew the entire situation, the latter was not a purchaser in good faith, and could acquire no rights by virtue of the negotiations had with the insane person. *Whitaker v. Ellis*..... 43

3. TAXATION—TAX SALES—PROPERTY OF INSANE PERSON—REDEMPTION—REIMBURSEMENT OF PURCHASER. Persons bidding in the property of an insane person at tax sale, under unwarranted negotiations with the insane owner, while unable to hold the land, are entitled, in an equitable suit, to be reimbursed for the amount of the taxes paid; especially in view of Rem. Code, § 9259, relating to the redemption of the lands of insane persons sold for the nonpayment of taxes by the reimbursement of the purchaser. *Whitaker v. Ellis*. 43

Telegraphs and Telephones:

Contracts by telephone, evidence of, see CONTRACTS, 4.

Mandamus to compel telephone company to perform contract obligations, see MANDAMUS, 3.

1. TELEGRAPHS AND TELEPHONES—FRANCHISES—POWER TO GRANT—STATUTES. Rem. Code, § 9314, which gives a telephone company the right to maintain lines along any public road, provided that, where the right of way is in an incorporated city, the "consent" of the city council shall be first obtained, does not prevent a city from granting a franchise controlling the rates that may be charged. *State ex rel. Ellertsen v. Home Telephone & Telegraph Co*..... 196

2. SAME. A city of the first class has power to grant a telephone franchise for the use of the city's streets and alleys, with limitations on the rates that may be charged, under Rem. Code, § 7507, subd. 7, empowering first-class cities to regulate and control the use of streets and alleys and to authorize or prohibit the use of electricity at, in or upon them, and to prescribe the terms and conditions upon which

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the same may be used and to regulate the use thereof. *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.* 196

3. SAME—FRANCHISE—POWER TO GRANT—STATUTES—IMPLIED REPEAL. Rem. Code, § 7507, subd. 7, empowering cities of the first class to grant telephone franchises for the use of its streets and alleys, was not impliedly repealed by the enactment of the general telephone franchise act of 1890, Id., § 9300 *et seq.* *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.* 196

4. SAME—FRANCHISES—CONDITIONS. A telephone franchise ordinance limiting the amount of the rates or charges is a contract obligation, binding until abrogated by the state in the exercise of its police power; and the company having accepted and agreed upon the terms cannot complain thereof until relieved by the public service commission. *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.* 196

5. SAME—CONDITIONS—RELIEF—FILING SCHEDULE OF RATES. In such a case, a franchise limiting one-party residence rates to $2 is not affected by the company's filing with the public service commission a schedule raising the rate to $3, where there was no compliance with Rem. Code, § 8626-43, requiring affirmative action by the public service commission directing the termination of contracts in order to relieve the company from its contractual obligations to users of its service. *State ex rel. Ellertsen v. Home Telephone & Telegraph Co.* 196

6. TELEGRAPHS AND TELEPHONES—MISTAKE IN TRANSMISSION—DAMAGES—PROXIMATE CAUSE. Where, through the mistake of a telegraph company, apples shipped from Oregon to California were delivered to the consignee by the consignor's agent at $1.08 per box, instead of $1.80, in reliance upon an erroneous message, and the mistake of the telegraph company was the proximate cause of the consignor's loss, it was not the duty of the consignor to mitigate his damages by the acceptance of a prompt tentative offer by the consignee to settle for the apples at $1.50 per box; since that would have made a new contract and waived his claim against the telegraph company; and the measure of his damages is the difference between the price received by him on the completed sale at $1.08, and the fair market value of the apples (overruling on rehearing, *Id.*, 98 Wash. 431). *Bentley v. Western Union Tel. Co.* 433

Tender:

As condition precedent to action on bond, see PRINCIPAL AND SURETY, 3.

Of repayment as condition precedent to action for rescission, see VENDOR AND PURCHASER, 1.

Terms:

Of courts, see COURTS, 2.

Tide Lands:

Reversion to abutting owners of property within vacated street, see MUNICIPAL CORPORATIONS, 3.

Agreement between adjoining owners of for waterway, see NAVIGABLE WATERS.

Timber:

Damages for waste in cutting timber during period of redemption, see MORTGAGES, 3.

Time:

For substitution on death of party pending appeal, see APPEAL AND ERROR, 6.

For allowance of interest, see INTEREST.

1. TIME—PER DIEM COMPENSATION—FRACTIONS OF A DAY—OFFICERS. Under Rem. Code, § 42-3, providing that an official court reporter, who is made an officer of the court, shall be paid ten dollars per diem for every day that he is actually in attendance, he is entitled to the per diem for each day regardless of the period of time that such attendance covers, inasmuch as the law does not consider fractions of a day in fixing salaries and fees for public services at so much per day. *State ex rel. Greb v. Hurn*..... 328

Title:

Estoppel to assert, see ESTOPPEL, 2.

To property insured, see INSURANCE, 1, 4.

To property sold on foreclosure of chattel lien, see LIENS.

Of vendor, see VENDOR AND PURCHASER, 4.

Torts:

See FRAUD; TROVER AND CONVERSION.

Of employers, see MASTER AND SERVANT.

Of city, see MUNICIPAL CORPORATIONS, 7, 8.

Of school district, see SCHOOLS AND SCHOOL DISTRICTS, 1, 7.

Trails:

As highway by prescription, see HIGHWAYS, 1, 2.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 11-15.

Trespass:

Injuries to trespassers, see RAILROADS, 2.

Trial:

See NEW TRIAL.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 4, 5, 11.

Trial—Continued.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 11-15.

Review of verdicts, see APPEAL AND ERROR, 19.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 22-31.

Instructions as to damages to property taken or damaged for public use, see EMINENT DOMAIN, 11, 12.

Instructions in action for damages to railroad through construction of state highway, see EMINENT DOMAIN, 17.

Instructions in action for injury to servant, see MASTER AND SERVANT, 10.

Instructions in action for injury through collision with automobile, see MUNICIPAL CORPORATIONS, 9, 10.

Instructions in action for injury to child through defective swing, see SCHOOLS AND SCHOOL DISTRICTS, 5.

1. TRIAL—ORDER OF PROOF. It is not error to refuse to reopen a case in rebuttal to establish a fact, which, if material, the plaintiff should have presented in his case in chief. *Brown v. Jamison*.. 124

2. TRIAL—ADMISSION OF EXHIBIT—OBJECTION—SUFFICIENCY—WAIVER. As exhibit, being a statement of account containing an admission against defendant's interest, stated by plaintiff's counsel to have been received through the mail in response to a statement sent by them, cannot be objected to for the first time on appeal for want of identifying testimony, where the only objection below was on the ground that it was in the nature of a compromise and not containing any admission. *Drescher Lumber Co. v. Forest Mills of British Columbia* 664

3. TRIAL—ISSUES AND PROOF—INSTRUCTIONS. In an action for damages for the value of timber taken, and for damages to the land itself by the removal of the timber, in which much evidence on those issues was taken, they are properly submitted to the jury. *Ahlman v. Wilson* 677

4. SAME. In such an action, it is not erroneous to submit an issue as to damages from "careless and negligent" logging operations, although the complaint did not use those words, when the complaint was clearly to that effect. *Ahlman v. Wilson* 677

Trover and Conversion:

1. TROVER AND CONVERSION—WHAT CONSTITUTES—CLAIM OF TITLE—TRUSTEES OF CORPORATION. Corporation trustees are not guilty of a conversion in taking possession of the property of a stockholder, where, by resolution, they disclaimed any intention of claiming the same as owners, admitted the adverse title, and demanded its removal from the plant. *Clark v. Groger* 188

2. SAME—TRUSTEES OF CORPORATION—LIABILITY. One refusing to remove his property on demand of trustees of a corporation, cannot

Trover and Conversion—Continued.

hold the trustees liable for the value of the property used, as for a conversion by them, his remedy being against the corporation for an accounting for the property used by it. *Clark v. Groger*.... 188

Trusts:

Effect of trust on limitation, see LIMITATION OF ACTIONS.
Testamentary trustees, see WILLS, 1.

1. TRUSTS—EXPRESS TRUST—CERTAINTY. There is such want of certainty that a court of equity cannot declare a trust in property conveyed by an aged woman by deed absolute to one of her sons, in full confidence that, on her death, such son "would make proper adjustment" of her relations to her other children, "leaving such adjustment solely and exclusively" to such son without any interference by any of the other children. *Lanigan v. Miles*..... 82

2. SAME—IN LAND—"EXPRESS TRUST." An express trust is created by the breach of an agreement whereby defendants agreed to purchase the assets of a bankrupt corporation at the trustees' sale for the joint benefit of the defendants and the plaintiff, who was a stockholder and had made a deposit to guarantee his bidding at the sale, the defendants having purchased at the sale and refused to perform their agreement to convey one-half to the plaintiff, whose deposit was returned to him; it appearing that the plaintiff's interest in the company was so slight as not to avail him anything. *Farrell v. Mentzer* 629

3. TRUSTS—IN LAND—PAROL EVIDENCE—FRAUDS, STATUTE OF. The statute of frauds is an absolute provision that parol evidence is inadmissible to establish an express trust in real estate. *Farrell v. Mentzer* 629

4. TRUSTS—EXPRESS TRUSTS—ACTIONS—LIEN—LIMITATIONS. Where the trustees of an express continuing trust asserted adverse claims for more than two years and made the same known to the *cestui que trust* who then elected her remedy and litigated her claims to final judgment without asserting the proper equitable remedy to enforce the trust, an action therefor is barred by the statute of limitations. *Hotchkin v. McNaught-Collins Improvement Co*... 161

5. SAME—REMOVAL OF TRUSTEE. A trustee should not be removed for want of harmony between co-trustees, when there was nothing to prevent future harmonious cooperation, and he had committed only error and not a breach of trust. *In re Cornett's Estate*..... 254

6. TRUSTS—COMPENSATION OF TRUSTEES—FEES AS EXECUTORS. Trustees under a nonintervention will are not entitled to the statutory fees as executors until the termination of the trust. *In re Cornett's Estate* 254

7. SAME—COMPENSATION—STATUTES. Laws 1917, p. 666, § 92, making provision for a final accounting by trustees under a nonintervention

Trusts—Continued.

will, governs every case in which the trust was not fully executed prior to the time the act took effect, notwithstanding Rem. Code, § 1444, provided for no such accounting. *In re Cornett's Estate*. 254

8. SAME—COMPENSATION—NECESSARY SERVICES. A trustee under a nonintervention will may be allowed fees for necessary services of a continuing nature not performed by the other trustee, and properly chargeable as current expenses; he being entitled to reasonable compensation, under Laws 1917, p. 687, § 158. *In re Cornett's Estate* 254

9. SAME—COMPENSATION—ALLOWANCE. The court should not fix and make a division of fees between co-trustees, which it has decided can be allowed only at the termination of the trust, but should leave the matter to the decree of the court making final settlement. *In re Cornett's Estate* 254

Unlawful Detainer:

See FORCIBLE ENTRY AND DETAINER.

Vacation:

See JUDGMENT, 2, 3.
Of streets, see MUNICIPAL CORPORATIONS, 3.

Value:

Valuation of property for taxation, see TAXATION, 1.

Vendor and Purchaser:

Transfer of ownership of personal property, see SALES.
Purchasers at tax sale, see TAXATION, 2, 3.

1. VENDOR AND PURCHASER—RESCISSION—CONDITION PRECEDENT—TENDER. An action for rescission will not fail because of failure of the plaintiff to tender a repayment, where the complaint alleged such tender and the status quo was preserved; since a court of equity may impose equitable terms as a condition of relief. *Tyner v. Stults* 168

2. VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—DUTY TO INSPECT—EVIDENCE—SUFFICIENCY. A contract for the purchase of arid land may be rescinded for fraudulent and material misrepresentations as to the adequacy of a water supply, through a ditch, six miles in length, work on which was under way at the time of plaintiff's inspection, where the facts were peculiarly within the knowledge of the vendor and difficult of ascertainment and the representations were relied upon on that account. *Smith v. Fletcher* 218

3. SAME—RESCISSION BY VENDEE—INTEREST. Upon rescission of a contract for the sale of land in another state, judgment granting a cancellation of a note and mortgage for $10,000 given by the plaintiff, properly allows, in the alternative, a money judgment for the total

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price paid and the mortgage, with interest on the whole sum from the date of sale; since, if the mortgage is not cancelled, the plaintiff will be liable for interest secured by the mortgage. *Smith v. Fletcher* 218

4. VENDOR AND PURCHASER—TITLE—MERCHANTABLE TITLE. A good and marketable title is not shown where a title insurance company, upon the advice of its general counsel, whose learning and skill is not questioned, refused to insure the title because of a question of descent, it being an open question whether the law of Germany or of this state controlled. *Flood v. Von Marcard*..... 140

5. VENDOR AND PURCHASER—CONSTRUCTIVE NOTICE—RECORD—CHAIN OF TITLE. Constructive notice of a contract creating an easement in tide lands for a passageway for water craft is given by recording the contract, after the parties' title thereto had become vested by their applications to purchase under their preference rights, they then being in possession. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.* 608

Venue:

Change of for prejudice of judge, see JUDGES, 2, 3.

Verdict:

Review on appeal, see APPEAL AND ERROR, 19.

Waiver:

See ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 17.

Of objections to pleading, see CARRIERS, 3.

Of presentation of claim against estate, see EXECUTORS AND ADMINISTRATORS, 7.

Of claim against estate, see EXECUTORS AND ADMINISTRATORS, 8.

Notice and proof of loss insured against, see INSURANCE, 10.

Notice of proceedings to vacate judgment, see JUDGMENT, 3.

Repairs by landlord as waiver of performance by tenant, see LANDLORD AND TENANT, 5.

Of objections at trial, see TRIAL, 2.

War:

As affecting right of aliens to fishing license, see FISH.

1. WAR—ALIEN ENEMIES. Alien enemies who by the President's proclamation of war are recognized as friendly aliens and accorded security in the undisturbed peaceful pursuit of their lives and occupations and the consideration of all law abiding citizens, are authorized to maintain actions in our courts to secure their lawful occupations. *State ex rel. Constanti v. Darwin*..... 402

Warning:

To servant of dangers, see MASTER AND SERVANT, 6, 7.

Warrants:

Orders for payment from public funds, see MUNICIPAL CORPORATIONS, 11-14.

Warranty:

Covenants of, see COVENANTS, 3.
By insured, see INSURANCE, 4, 5.

Waste:

Damages for waste during period of redemption, see MORTGAGES, 3.

Waters and Water Courses:

See NAVIGABLE WATERS.
Condemnation of land for waterway, see EMINENT DOMAIN, 1.
Condemnation of property for storage of, see EMINENT DOMAIN, 2.
Condemnation of lands for public water supply, see EMINENT DOMAIN, 4-9.

1. WATERS AND WATER COURSES—APPROPRIATION AND PRESCRIPTION—LOSS OF RIGHT—EVIDENCE—PAROL ADMISSIONS. Where the prescriptive right to maintain a dam at a certain height and overflow lands has become fully vested by adverse use for the statutory period of ten years it cannot be lost by a subsequent parol admission that the possession was not adverse or recognizing a right to have the dam lowered. *McInnis v. Day Lumber Co.* 38

2. WATERS AND WATER COURSES—GRANT TO CITY—DEED. Merely an easement is granted for the purposes stated, and no title to the water itself passes by a deed to a city granting the exclusive right and privilege to take and appropriate to its own use for all purposes any and all water flowing or which may hereafter flow into the stream over or across described lands of the grantor, together with the right to enter for the purpose of constructing flumes, pipe lines, etc., and also the privilege of flooding or backing water upon the premises; hence the owner of the servient estate may make such use of it as is not inconsistent with the easement granted (Overruling, on rehearing, *Id.*, 98 Wash. 317). *Raymond v. Willapa Power Co.* 278

3. SAME—GRANT TO CITY—EASEMENT—ADVERSE USE. If a water deed conveyed merely an easement to take and appropriate water, lay pipe lines, and flood or back water upon the premises, there can be no adverse title by prescription, where there was no interference, either present or threatened, with the easement and rights granted. *Raymond v. Willapa Power Co.* 278

Width:

Of highway by prescriptive use, see HIGHWAYS, 2.

Wills:

1. WILLS — NONINTERVENTION WILLS—TRUSTEES—POWERS. Under a nonintervention will imposing a trust in the executors beyond the proving of the will, they act as trustees, and it is an error in terms to call them executors, but without prejudice, where the decree gave them the attributes and powers of trustees. *In re Cornett's Estate* 254

2. WILLS—CONTESTS—ABUSED DISCRETION—STATUTES. Under Laws 1917, p. 648, § 19, substituting a discretionary power to award costs in will contests for the arbitrary rule of Rem. Code, § 1313, requiring costs to be awarded against an unsuccessful contestant, it is an abuse of discretion to award costs against a contestant who made out a *prima facie* showing of probable cause for contesting a will, it being made to appear that the testator had executed a prior will in favor of contestant and had probably been unduly influenced to execute a later will. *In re Eichler's Estate*..... 497

3. WILLS—CONSTRUCTION—CONDITIONS PRECEDENT—RESTRAINT OF MARRIAGE. Since a will speaks from the date of the testator's death, a bequest to a legatee provided she is legally divorced from her husband and still bears his name, is not a restraint of marriage or an inducement to obtain a divorce, since it imposes only a condition precedent and not a condition subsequent; and if she was not divorced at the date of testator's death, the legacy lapsed, notwithstanding a subsequent divorce. *In re Nichols' Estate*..... 303

4. WILLS—CONSTRUCTION—PAYMENT OF DEBT BY LEGACY—PRESUMPTION. There is no presumption that a bequest is in payment of a debt due the legatee, especially where it was less than the debt; and even though the creditor was named as a residuary legatee, where the residuum is uncertain in amount or time of payment. *Olsen v. Hagan* 321

Witnesses:

Opinion evidence in civil actions, see DAMAGES, 2.
Experts, see EVIDENCE, 4, 5.
Expert testimony as to safety of playground apparatus, see SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

Work and Labor:

1. WORK AND LABOR—SALARY—QUANTUM MERUIT. Where plaintiff's employment was admitted, and the evidence showed that no specific salary was agreed upon, the plaintiff was entitled to recover upon *quantum meruit*. *Rainey v. Pearce*..... 536

Workmen's Compensation Act:

See MASTER AND SERVANT, 1-3.

Writings:

Parol evidence to vary writings, see EVIDENCE, 3.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Stipulations in writing, necessity for review, see STIPULATIONS.

Writs:

See CERTIORARI; INJUNCTION; MANDAMUS; PROHIBITION; REPLEVIN.